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(32,335)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 768

JOHN C. DENNEY, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON; O. O. CALDERHEAD, AS SUPERVISOR OF TRANSPORTATION OF WASHINGTON, AND C. REA MOORE, ETC., ET AL., APPELLANTS,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 166 E

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

v.

WALTER B. WHITCOMB, as Director of Public Works of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT—Filed February 19, 1925

To the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Pacific Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of California, in compliance with an order filed and entered [fol. 4] in the above entitled cause on January 5, 1925, brings this its amended and supplemental complaint against the defendants, and thereupon complains and charges as follows:

I

That it is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business at San Francisco in said state, and is a citizen of said state. That during all of the times referred to in this complaint, it has owned and operated and now owns and operates a telephone and telegraph system and has been and is now engaged in

operating and conducting a public telephone and telegraph system in the State of Washington and in the states of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service. Telephone exchange service is service between telephone stations within the same local service area, and telephone toll service is telephone service between telephone stations located in different local service areas; the State of Washington is divided into a number of local service areas. The telephone exchange service and intrastate telephone toll service together constitute the whole of plaintiff's tele- [fol. 5] phone service between points within the State of Washington. Telegraph service is both intrastate and interstate, and intrastate telegraph service between points within the State of Washington. That it has complied with all the laws of the State of Washington relating to foreign corporations, has paid its annual license fee last past due, and is duly authorized to do business therein.

II

That heretofore, to-wit: on the 24th day of April, 1923, this plaintiff duly filed its original complaint in this Honorable Court against E. V. Kuykendall, as Director of Public Works of the State of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons then constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington.

III

That at all times between March 1, 1923, and noon of December 16, 1924, E. V. Kuykendall was the duly appointed, qualified and acting Director of Public Works of Washington, and during all of such times was a citizen and resident of the Eastern District of Washington; that at all times from March 1, 1923, down to and including [fol. 6] the 29th day of February, 1924, Hance H. Cleland was the duly appointed, qualified and acting Supervisor

of Public Utilities of the State of Washington, and during all of said times was a citizen and resident of the Eastern District of Washington; that at noon on December 16, 1924, said E. V. Kuykendall resigned as Director of Public Works of the State of Washington, and said Walter B. Whitcomb was appointed as Director of Public Works of the State of Washington, and at all times since said date has been and now is the duly appointed, qualified and acting Director of Public Works of the State of Washington. That said Hance H. Cleland resigned the office of Supervisor of Public Utilities of the State of Washington on February 29, 1924; that on March 1, 1924, said Walter B. Whitcomb was appointed to said office and at all times from said March 1, 1924, down to noon of December 16, 1924, said Walter B. Whitcomb was the duly appointed, qualified and acting Supervisor of Public Utilities of the State of Washington; that at noon on December 16, 1924, said Walter B. Whitcomb resigned said office, and no one has been appointed since said date to fill said office.

IV

That the defendant, Walter B. Whitcomb, is the duly appointed, qualified and acting Director of Public Works [fol. 7] of the State of Washington, and is a citizen and resident of the Western District of Washington; and that Frank R. Spinning is the duly appointed, qualified and acting Supervisor of Transportation of the State of Washington, and is a citizen and resident of the Western District of Washington. That said Walter B. Whitcomb and said Frank R. Spinning are now the members of and constitute the Department of Public Works of the State of Washington. That the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney General of the State of Washington, and is a citizen and resident of the Western District of Washington.

V

This suit is of a civil nature in equity, is a controversy between citizens of different states and arises under the constitution and laws of the United States in that plain-

tiff seeks to enjoin the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for intrastate telephone service throughout the State of Washington, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public, and, in consequence, said order seeks to deprive [fol. 8] plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment to the Constitution of the United States, and is therefore null and void.

The amount in controversy in this suit exceeds the sum or value of $3,000.00 exclusive of interest and costs.

VI

That on August 8, 1919, the Public Service Commission of Washington, an administrative body, duly created by the statutes of said state, and the predecessor of, exercising like powers as the said Department of Public Works, made an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, both exchange and intrastate toll, within the State of Washington. A copy of said rates applicable to Seattle and Tacoma, applicable to farmer line rates effective throughout the state, and toll rates effective therein, is filed herewith, marked Exhibit "A" and hereby specially referred to and made a part hereof.

VII

That on September 29, 1922, plaintiff filed with the said Department of Public Works a schedule of rates to be [fol. 9] charged by plaintiff for exchange telephone service in said state. That said schedule increased the rates to be charged for exchange telephone service in substantially all the exchanges owned and operated by plaintiff in the State of Washington.

VIII

That on September 24, 1922, the said Department of Public Works issued an order suspending for the full statutory period the operation of said rates so filed by plaintiff on September 20, 1922, and directing the plaintiff to file for the consideration of said Department of Public Works a toll rate schedule for intrastate telephone toll service, conforming in principle with the toll rates filed by the plaintiff and effective prior to the war period.

IX

That on October 5, 1922, the plaintiff filed, as directed aforesaid, a toll rate schedule for intrastate telephone toll service, a copy of which is filed herewith marked Exhibit "B" and hereby specially referred to and made a part hereof, and concurrently therewith filed with said Department a withdrawal and cancellation of the rates filed by it on September 20, 1922, except the rates and charges for telephone exchange service applicable to the [fol. 10] cities of Seattle and Tacoma. That schedule of rates so filed by it on September 20, 1922, for Seattle and Tacoma and not withdrawn and cancelled, are filed herewith marked Exhibit "C" and hereby specially referred to and made a part hereof.

X

That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and the first day of March, 1923, said Department of Public Works held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said state; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the intrastate toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as

aforesaid on September 20, 1922. That on the 31st day of March, 1923, two of the three members then constituting said Department of Public Works, filed an order, a copy of which is filed herewith marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby [fol. 11] the application of plaintiff to increase its rates for service was in all respects denied. That on the same date, to-wit: March 31, 1923, said Hance H. Cleland, then the Supervisor of Public Utilities and a member of said Department of Public Works, who was present at all of said hearings, filed a dissenting opinion, a copy of which is filed herewith marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates, both intrastate toll and exchange, then and theretofore being charged by plaintiff, were unreasonable and less than sufficient, and in which he fixed certain rates, both intrastate toll and exchange, as reasonable and not more than sufficient. That said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in said dissenting opinion (Exhibit "E"), are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff proposes to establish and make effective pending the final decree in this cause. That the intrastate toll rates set forth in Exhibit "F" are the same as the intrastate toll rates set forth in Exhibit "B."

XI

That The Home Telephone and Telegraph Company of Spokane is a corporation organized and existing under [fol. 12] and by virtue of the laws of the State of Washington, and is the owner of and operates the telephone system furnishing telephone service to the City of Spokane and the territory immediately adjacent thereto. That all of the capital stock of said Home Company of Spokane is owned by plaintiff, and because of such stock ownership said Department of Public Works, in considering plaintiff's application for increased rates, treated the Spokane Exchange as an exchange of plaintiff, and in arriving at the rate base

for the State of Washington, included therein the property used and useful in furnishing telephone service to said City of Spokane and the territory immediately adjacent thereto. That the validity of the said order of said Department of March 31, 1923, as affecting the rates for telephone service in the said City of Spokane and territory immediately adjacent thereto, is the subject of a separate suit brought in this court by said The Home Telephone and Telegraph Company of Spokane.

XII

The cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of said Home Company of Spokane as aforesaid, and land being included at present value), now being used or useful [fol. 13] in furnishing its intrastate telephone and telegraph service to the public therein and exclusively devoted to the rendition of that service, was, as of the 31st day of December, 1922, the sum of $27,594,800. The cost to plaintiff of its property constituting its Seattle Exchange and now being used or useful in furnishing intrastate telephone service to its subscribers and patrons therein was, as of the 31st day of December, 1922, the sum of $16,928,567, and the cost to plaintiff of its property constituting its Tacoma Exchange and used or useful in furnishing intrastate telephone service to its subscribers and patrons therein was, as of the 31st day of December, 1922, the sum of $2,874,647, the two exchanges named thus constituting approximately 72 per cent of plaintiff's property in the State of Washington. That the cost to plaintiff of its said property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the Cities of Seattle and Tacoma is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto [fol. 14] made since that time (excluding the Spokane Exchange from the rate base of the Department of Public

Works and also excluding therefrom the property owned by the plaintiff in the State of Washington and used by it in interstate business.) The present cost of reproduction of said property used in intrastate business, as it existed on the 31st day of December, 1922, is the sum of $45,210,899 for the State of Washington (not including Spokane); the sum of $27,017,522 for the City of Seattle, and the sum of $4,981,176 for the City of Tacoma. That the cost of reproduction of said property used in intrastate business, less depreciation, as of the 31st day of December, 1922, is the sum of $41,332,741 for the State of Washington; the sum of $24,797,238 for the City of Seattle and the sum of $4,516,940 for the City of Tacoma. The fair and reasonable value of said property used in intrastate business for said state (not including Spokane) is the sum of $33,488,264; for said City of Seattle the sum of $20,745,647 and for said City of Tacoma the sum of $3,441,043, all as of the 31st day of December, 1922, the two cities named thus constituting approximately 72 per cent of the total fair value of plaintiff's property in the State of Washington.

The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the [fol. 15] item of franchises, or the item known as "going concern value," but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property.

XIII

The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

XIV

That the plaintiff's telephone business in the State of Washington has been conducted efficiently and economically during all of the times herein referred to. Plaintiff's net earnings derived from its intrastate telephone and telegraph business within the State of Washington, stated in

rate per cent annual return upon the cost of the property on the one hand and upon the fair value thereof on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods stated, have been as follows:

	Cost	Fair value
[fol. 16] Year 1919, State of Washington	4 62%	3 41%
Year 1919, City of Seattle	3 99%	2 67%
Year 1919, City of Tacoma	99%	81%
Year 1920, State of Washington	4 00%	3 02%
Year 1920, City of Seattle	1 86%	1 29%
Year 1920, City of Tacoma	89%	74%
Year 1921, State of Washington	2 97%	2 32%
Year 1921, City of Seattle	70%	52%
Year 1921, City of Tacoma	58%	48%
Year 1922, State of Washington	2 80%	2 17%
Year 1922, City of Seattle	19%	16%
Year 1922, City of Tacoma	90%	75%

(Spokane not included)

At all of the times aforesaid, the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XV

That the rates of plaintiff in the State of Washington established and in force, as herein set forth, during the years 1919, 1920, 1921 and 1922, and which remained in effect under the order of said Department of March 31, 1923, until as hereinafter stated, were and are not compensatory and were and are less than just and reasonable rates. That the amounts by which the net revenue derived by the plaintiff from its intrastate telephone and telegraph business in the State of Washington and in the cities of Seattle and Tacoma, were less than eight per cent of the [fol. 17] cost of the property used or useful in each case in and exclusively devoted to the rendition of service within said state and for the said cities were for the

Year 1919,	State of Washington	$564,912
	City of Seattle	310,469
	City of Tacoma	187,386
Year 1920,	State of Washington	722,503
	City of Seattle	532,732
	City of Tacoma	192,845
Year 1921,	State of Washington	1,067,873
	City of Seattle	830,487
	City of Tacoma	204,898
Year 1922,	State of Washington	1,326,805
	City of Seattle	1,185,707
	City of Tacoma	200,963

(Spokane not included)

XVI

That the maintenance of the rates and charges as aforesaid in Exhibit "A" under the order of said Department of March 31st, 1923, compels the plaintiff to provide intrastate service at rates which are not compensatory and which are less than just and reasonable, and results in the confiscation of the property of plaintiff in the State of Washington and the cities of Seattle and Tacoma devoted to public use and used and useful in rendering intrastate telephone and telegraph service, and deprives plaintiff of [fol. 18] its property without compensation and without due process of law, and denies to it the equal protection of the laws, in violation of the Constitution of the United States, particularly Article Fifth and the Fourteenth Amendment thereof. That said order of March 31, 1923, is therefore null and void.

XVII

That on the 30th day of April, 1923, plaintiff applied to a statutory court, convened as provided for by Section 266 of the Judicial Code of the United States, for a temporary injunction in conformity with the prayer set forth in its original complaint, and that on said 30th day of April, 1923, said application was denied.

XVIII

That thereafter this plaintiff renewed its application for a temporary injunction, and such application was heard by a statutory court convened as provided for by Section 266 of the Judicial Code of the United States, and thereafter such application was granted by said last named court, and a temporary injunctive order, in conformity with the prayer set forth in said original complaint and the prayer in this amended and supplemental complaint, was entered and filed on July 23, 1924.

[fol. 19]

XIX

That inasmuch as the charges for exchange service are billed in advance, and the sum of money generally due monthly for exchange service from each of the subscribers and patrons of plaintiff is small, it was not feasible or practicable to make said injunctive order effective as to charges for exchange service until August 1, 1924, but that the charges for intrastate toll service, provided for by said injunctive order, said charges being billed in arrears, were made effective on July 23, 1924.

XX

That at all times after March 31, 1923, and down to the 23rd day of July, 1924, the rates for telephone exchange service prescribed by said order of March 31, 1923, were in full force and effect, and were the rates and charges collected by this plaintiff for its telephone exchange service in the State of Washington until August 1st, 1924, and that at all times down to the 23rd day of July, 1924, the rates prescribed by said order of March 31, 1923, for intrastate toll service were in full force and effect, and were the rates and charges collected by this plaintiff for its said intrastate telephone toll service in the State of Washington.

[fol. 20]

XXI

The cost to plaintiff of its property in the State of Washington (not including Spokane, that being the property of said The Home Telephone and Telegraph Company as

aforesaid and land being included at its present value) now being used or useful in furnishing its intrastate telephone and telegraph service to the public therein and exclusively devoted to the rendition of said service, was, as of the 31st day of December, 1923, the sum of $31,730,512, and as on the 31st day of July, 1924, the sum of $32,649,993. The cost to plaintiff of its property, constituting its Seattle Exchange, and now being used and useful in furnishing intrastate service to its subscribers and patrons therein, was, as of the 31st day of December, 1923, the sum of $19,547,304, and as of July 31, 1924, the sum of $19,750,629. The cost to plaintiff of its property, constituting its Tacoma Exchange, and now being used and useful in furnishing intrastate telephone service to its subscribers and patrons therein, was as of the 31st day of December, 1923, the sum of $3,035,958, and as of the 31st day of July, 1924, the sum of $3,235,000. The two exchanges thus named constitute approximately 71% of plaintiff's property in the State of Washington as of December 31, 1923, and 70% as of July [fol. 21] 31, 1924. That the cost to plaintiff of its said property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the cost of said respective properties as of July 31, 1924, on account of the additions and betterments in the meantime made to said respective properties.

The fair and reasonable value of said property used in intrastate business for said State (not including Spokane) was, as of the 31st day of December, 1923, the sum of $37,623,977; for said City of Seattle, the sum of $23,364,384, and for said City of Tacoma the sum of $3,682,355, the two cities named thus constituting 72% of the total fair value of plaintiff's property in the State of Washington. The fair and reasonable value of said property used in intrastate business in said state (not including Spokane) was the sum of $38,542,558; for said City of Seattle the sum of $23,567,709, and for said City of Tacoma the sum of $3,802,057, all as of the 31st day of July, 1924, the two cities named thus constituting approximately 71% of the total fair value of plaintiff's property in the State of Washington.

The foregoing statements as to the cost to plaintiff of said respective properties as of the dates in this paragraph

mentioned, include nothing on account of the item of fran-
[fol. 22] chise or the item known as "going concern value," but said latter item has been considered in determining the present fair and reasonable values in this paragraph set forth.

XXII

That throughout the year 1923 and from January 1st to August 1st, 1924, this plaintiff practiced all reasonable economies consistent with adequate and efficient service to the public; that plaintiff's net earnings derived from its intrastate telephone and telegraph business within the State of Washington stated in rate per cent annual return upon the cost of the property upon the one hand, and upon the fair value thereof on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods stated, were as follows:

	Cost	Fair value
Year 1923, State of Washington	2.70%	2.25%
City of Seattle	.59% loss	.49% loss
City of Tacoma	2.13%	1.70%
January 1, 1924, to August 1, 1924:		
State of Washington	2.48%	2.25%
City of Seattle	.43% loss	.43% loss
City of Tacoma	2.40%	2.40%
(Annual Basis)		

That the amounts by which the net revenue derived by the plaintiff from its intrastate telephone and telegraph busi-
[fol. 23] ness in the State of Washington and in the Cities of Seattle and Tacoma were less than eight per cent of the cost of the property used or useful in each case in and exclusively devoted to the rendition of intrastate telephone and telegraph service within the State of Washington and for the said cities, were for the year 1923:

For the State of Washington	$1,577,103
City of Seattle	1,572,624
City of Tacoma	173,821
and for January 1 to August 1, 1924:	
State of Washington	1,718,412
City of Seattle	1,576,955
City of Tacoma	175,628
(Annual Basis)	

XXIII

That had the rates set forth in Exhibit "F," being the rates found by Hance H. Cleland, then Supervisor of Public Utilities, in his dissenting order of March 31, 1923, to be just, fair, reasonable and sufficient for intrastate telephone and telegraph service in the State of Washington, been in effect for the year 1923, the return to plaintiff thereunder on the fair value of its property used and useful in rendering intrastate telephone and telegraph service would have been—

For the State of Washington	5.35%
City of Seattle	2.83%
City of Tacoma	5.43%

[fol. 24] And for the same period, the return upon the cost of said property in the State of Washington would have been 6.40%; 3.42% for the City of Seattle, and 6.47% for the City of Tacoma; and plaintiff avers that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which plaintiff is lawfully entitled, but are the rates and charges which plaintiff has established and put into effect under said injunctive order of July 23, 1924, pending the final decree in this cause.

XXIV

That plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F" or any rates or charges higher than those specified in said Exhibit "A" or any rates not sanctioned by the Department of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A," and the plaintiff, its directors, officers, agents and employees will be subjected to a multiplicity of suits and incur the penalties and punishments prescribed by the laws of the State of Washington, and may, under the pro-[fol. 25] visions of said laws, be charged with the commis-

sion of gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000.00 or imprisonment in a county jail of one year, or both.

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedule of rates and charges in said Exhibit "F," or any rates and charges other than those provided in said Exhibit "A," and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its right under the Constitution of the United States, as hereinbefore alleged.

That unless the defendants are restrained and enjoined, as herein prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A." That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no [fol. 26] practical way to enforce and collect its rates and charges, except by cutting off and refusing service for default in payment of its bills rendered monthly therefor, and its subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits in various jurisdictions throughout the State of Washington to restrain plaintiff from cutting off and denying service for such non-payment of bills, and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.

That large numbers of suits will be brought in the courts of the State of Washington by defendants and plaintiff's subscribers and patrons to restrain and enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F," or any schedule other than said schedule Exhibit "A," and to compel plain-

tiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A." That the issues which will be presented in each suit are presented and should be decided in this action.

Wherefore, plaintiff prays the judgment and decree of this court:

First. That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of [fol. 27] Public Works, be decreed to be confiscatory in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect;

Second. That defendants, and each of them, and all other persons, be permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A" filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges;

Third. That defendants, and each of them, and all other persons, be permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from charging and collecting the rates and charges set forth in said schedule Exhibit "F" until just and reasonable schedules of rates and charges are established according to law;

Fourth. That the defendants, and each of them, and all other persons, be permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any [fol. 28] penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges Exhibit "A" or for putting into effect any schedule of rates and charges not in excess of those set forth in Exhibit "F";

Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honor to grant unto the plaintiff a writ of subpena of the United States, directed to said Walter B. Whitcomb, as Director of Public Works of the State of Washington, and said Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons now constituting the Department of Public Works of the State of Washington, and to John H. Dunbar, Attorney General of the State of Washington, commanding them and each of them to answer unto this amended and supplemental complaint, and to obey and perform such order and decree in the premises as to the Court may seem proper and required by the principles of equity and good conscience; and the plaintiff will ever pray.

The Pacific Telephone and Telegraph Company, by Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Its Solicitors. W. V. Tanner, of Counsel.

[fol. 29] *Duly sworn to by C. O. Myers. Jurat omitted in printing.*

[fol. 30] EXHIBIT "A"

The Pacific Telephone and Telegraph Company Exchange Rates—Seattle, Tacoma, Washington

Farmer Line Rates—Exchanges State of Washington

Toll Rates—State of Washington

Effective August 1, 1919

W P S C No. 2 Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange—Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Two-party Line		
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75
Residence—Unlimited Service		
Individual Line	3.75	4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

[Sol. 31] Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange—Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	150	$ .04
Auxiliary Line	2.50	2.75	...	...
Extension (with or without bell)	.75	.75	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (without bell)	...	...	...	...
Extension (with bell)	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$ .15	*	3	$ .05
Extension (with or without bell) per month	1.00	1.00	...	...

[Sol. 32] Residence—Coin Box Service

Individual Line	...	...	...	...
Extension (without bell) per month	...	...	...	...
Extension (with bell) per	...	...	...	...

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

* *Toll* per month additional.

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.00	$7.25
Two-party Line	6.00	6.25
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.00	3.25
Two-Party Line	2.50	2.75
Four-Party Line	2.00	2.25
Extension (without bell)	.50	.75
Extension (with bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[Fol. 33] W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$	$		$
Auxiliary Line				
Extension (with or without bell)				

Residence—Measured Service

Individual Line				
Extension (without bell)				
Extension (with bell)				

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
Extension (with or without bell) per month	1.00	1.00	...	...

Residence—Coin Box Service

Individual Line	....	....	...	...
Extension (without bell) per month	....	....	...	...
Extension (with bell) per month	....	....	...	...

Issued: November 4, 1918. Effective: March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

[fol. 34] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2.00
Additional switchboard equipment for each group of 5 lines or less	.20
First bothway trunk line—Individual business rate plus $2.00 per month.	
Each additional bothway trunk line—Rate for first bothway trunk line less 25%.	
Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.	

* 25c per month additional.

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)	$1 00	$1 00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive	50	75
11 to 20 inclusive	45	70
21 to 35 inclusive	40	65
36 to 50 inclusive	35	60
Over 50	25	50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: November 4, 1918. Effective: March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

[fol. 35] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month
Switchboard with battery power, ringing circuit and switchboard telephone for each position.	None
Trunk Lines—Bothway only (Enough bothway trunk lines will be provided to properly handle the traffic)	None
Each exchange message	$.025

	Wall set	Desk set
Each Station, primary or extension, not in guest rooms (See Mileage Rates, Sec. 3)..	$1 00	$1 00
Each Station, primary or extension, in guest rooms:		
1 to 10 inclusive..	50	75
10 to 20 inclusive	45	70
21 to 35 inclusive	40	65
36 to 50 inclusive..	35	60
Over 50.	25	50

Minimum installation: Ten (10) stations, excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rates Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective January 1, 1912.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 36] W. P. S. C. No. 2, Section 3

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Farmer Line Service

Total Number of Stations	Rate per year
300 stations or less	$3 00
300 to 500 stations	3 60
500 to 750 stations	4 20
750 to 1,000 stations	5 40
1,000 to 2,000 stations	7 20
2,000 to 4,000 stations	8 40
4,000 to 6,000 stations	9 60
6,000 to 8,000 stations	10 80
8,000 to 12,000 stations	12 00
12,000 stations and over	15 00

Company Furnishes—For not less than 5 subscribers per circuit switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes facilities to city or town limits. Complete telephone and battery, substation protection. Maintenance of above.

The subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers will be subject to a Ten Per Cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

Issued: September 1, 1916. Effective: September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective May 14, 1915.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

P. H. Coolidge, General Commercial Superintendent.

[fol. 37] Telegraph and Telephone Service Bulletin No. 22

Order No. 2495

December 13, 1918.

There are many counties and districts in which a free toll service is granted the subscriber within such county or district, the exchange rate presumably having been made with a view of such free toll service. This Order shall not be construed as requiring a discontinuance of these privileges pending a study and revision of these exchange rates.

Nothing in this Order establi ing toll rates shall be construed as changing rates made without reference to mileage now established for service within a certain county or other area when such rates are not in excess of ten cents, but no further rates of this character shall be established without specific approval of the Postmaster General.

In competitive situation where the earning value of a property under Federal control would be unfavorably affected by the establishment of rates and charges herein ordered, an exception may be made by filing with the Postmaster General a statement to that effect with a proposal of modification from ordered rates and such modifications may go into effect unless vetoed or otherwise ordered by the Postmaster General within thirty days and during such thirty days existing rates may be continued.

[fol. 38] I. Classification of Toll Telephone Service

The following classes of telephone toll message service shall be established effective at 12:01 A. M. January 21st, 1919.

1. Station to Station Messages.

This service shall be defined by the following conditions:

(a) Orders for Station to Station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

(b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a Station to Station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in Station to Station service.

(d) Station to Station service may be operated as a Number Service, in which case the called station may be designated only by number, through A and B Switchboards

[fol. 39] or through tandem operator, etc.; or it may be operated through toll switchboard, and technically known as an "A Y" service, depending on the local circumstances, operating conditions, plant conditions, and the circumstances as to directory distribution and as to areas; and the more economical method will be employed in each case. The choice of method of operating Station to Station service will be determined solely as an operating arrangement not in any way affecting rates or service; except that where the Number method is employed it is required that order be accepted stating only the telephone number of the called station.

(c) The charges for Station-to-Station messages shall not be "reversed," i. e., collected at the called station.

2. Person to Person Calls.

This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of the Person-to-Person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified [fol. 40] in the order; provided that certain Report charges will be made under the conditions specified in the clause next below where communication may not be established.

(c) Orders for Person to Person service are accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

First. When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person cannot be secured within one hour (exclusive of any time during which "no circuit" or other cause prevents communication of the order to the distant city or exchange, or its completion.)

Second. When the designated person called refused to talk.

Third. When the report is returned that the designated person called is "out" or "out and will return at (specified time)" or "out and time of return unknown," "is absent from the city," and similar report advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establish [fol. 41] ing communication with the called person is done.

Fourth. When communication between the designated persons cannot be established because the designated person at the calling station is absent at the calling station; provided, that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

Fifth. When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.

Appointment calls are Person-to-Person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls.

Messenger calls are Person-to-Person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.

Collect calls are Person-to-Person calls, charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

[fol. 42] II. Standard Toll Rates for Station-to-Station Messages

Effective 12:01 A. M., January 21, 1919, following initial period rates are made standard throughout the United States for Station-to-Station toll messages where the dis-

tance between the exchanges, or toll points, does not exceed 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate is
0 miles	6 miles	$0 05
6 "	12 "	10
12 "	18 "	15
18 "	24 "	20
24 "	32 "	25
32 "	40 "	30

The following initial period rates are made standard for Station-to-Station toll messages for all distances in excess of 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate is
40 miles	48 miles	$0 35
48 "	56 "	40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance [fol. 43] between the center of blocks seven miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks 7 miles square, so placed on a polyconic projection of a Government Survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the international boundary line in the Straits of Georgia.

III. Standard Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., January 21, 1919, the following toll message rates are established for Person-to-Person calls, Appointment calls and Messenger calls:

1. The initial period rates for Person-to-Person Calls shall be approximately 25 per cent in addition to the Station-to-Station rate between the same points, in accordance with the schedule of computed rates for Person-to-
[fol. 44] Person, appointment and Messenger toll calls, attached hereto, and hereby made a part of this order; but no Person-to-Person rate shall be less than 20 cents.

2. In those cases where Person-to-Person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this Order, a Report Charge shall be made of approximately one-fourth the initial rate for Station-to-Station messages between the same points, in accordance with these schedules of computed rates for Person-to-Person, appointment and messenger toll calls, attached hereto and hereby made a part of this Order; but no Report Charge shall be less than 10 cents for any one call, nor more than $2.00.

3. The rates for Appointment Calls shall be approximately 50 per cent in addition to the rate for Station-to-Station messages between the same points in accordance with the schedule of computed rates for Person-to-Person, appointment and messenger toll calls, hereto attached and hereby made a part of this order; but in the case of any Appointment Call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of Person-to-Person Calls between the same points shall be made. No Appoint-
[fol. 45] ment Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

4. The rates for Messenger Calls shall be the same as applied to Appointment Calls between the same points plus any charges that may be required for the service of messenger. No Messenger Calls shall be accepted where the Station-to-Station rate is less than 15 cents.

IV. Standard Toll Night Rates

Effective 12:01 A. M., January 21, 1919, the following reductions shall be made in the rate and charges for Station-to-Station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12:00 Midnight, the Night Rate for Station-to-Station messages shall be approximately 50 per cent less than the regular Day Rate, in accordance with the schedule of computed night rates, attached hereto and hereby made a part of this Order; but no Night Rate shall be less than 25 cents.

2. Between the hours of 12:00 Midnight and 4:30 A. M., the Night Rates shall be approximately 75 per cent less than the established Day Rate, in accordance with the schedule of computed night rates attached hereto, and hereby made a part of this Order; but no Night Rate shall be less than 25 cents.

[fol. 46] 3. For the purpose of applying Night Rates, the time of day at the point at which a Station-to-Station message originates shall be used.

4. Day rate only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

V. Standard Initial Period, Overtime Period, and Overtime Rate

Effective 12:01 A. M., January 21, 1919, the following initial period, overtime period and overtime rates are made standard in connection with all toll calls and messages made at standard initial toll rates:

1. Standard Initial Period and Overtime Period

Where the Initial rate is	The initial period is	The overtime period is
$0 05	5 Minutes	5 Minutes
10	5 Minutes	3 Minutes
15	5 Minutes	2 Minutes
20	5 Minutes	2 Minutes
25	5 Minutes	1 Minute
30	3 Minutes	1 Minute
35	3 Minutes	1 Minute
All other rates	3 Minutes	1 Minute

Where Person-to-Person calls are accepted at the above Initial Rate, the initial period is 3 minutes and the overtime period is 1 minute.

[fol. 47] 2. Standard Overtime Rates are as Follows

Where the Initial rate is	the overtime rate is
$0 05	$0 05
10	05
15	05
20	05
25	05
30	10
35	10

and thereafter aproximately one-third of the initial rate, and in no case more than one-third of the initial rate, in accordance with the table of computed overtime charges hereto attached and hereby made a part of this Order.

A. S. Burleson, Postmaster General.

[fol. 48] Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls

Where the station-to-station day rate is—	The completed person-to-person rate is—	The completed appointment and messenger rate is—	The report charge is—
$ .05	Not Quoted	Not Quoted	Not Quoted
.10	Not Quoted	Not Quoted	Not Quoted
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the Station-to-Station day rate. When the Station-to-Station day rate is not evenly divisible by 4, 25% in addition to the Station-to-Station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the Station-to-Station day rate. When the Station-to-Station day rate is not evenly divisible by 2, 50% in addition to the Station-to-Station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth Station-to-Station day rate. When the Station-to-Station day rate is not evenly divisible by 4, one-fourth the Station-to-Station day rate computed to the next higher multiple of 5 cents; but no Report Charge will exceed $2.00.

[Ed. 49] Schedule of Computed Night Rates for Station-to-station Toll Messages

When the day rate is	The rate between 8:30 P. M. and 12:00 midnight is	The rate between 12:00 midnight and 4:30 A. M. is
$ .05	1day Rate	1day Rate
.10	1day Rate	1day Rate
.15	1day Rate	1day Rate
.20	1day Rate	1day Rate
.25	1day Rate	1day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate, computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 59]

Where the initial rate is	The initial period is	Overtime rate is	The computed charges are for						
			4 min.	5 min.	6 min.	7 min.	8 min.	9 min.	10 min.
$.05	5 Min.	$.05	$.05	$.05	$.10	$.10	$.10	$.10	$.10
.10	5 Min.	.05	.10	.10	.15	.15	.15	.20	.20
.15	5 Min.	.05	.15	.15	.20	.20	.25	.25	.30
.20*	5 Min.	.05	.20	.20	.25	.25	.30	.30	.35
.25*	5 Min.	.05	.25	.25	.30	.35	.40	.45	.50
.30	3 Min.	.10	.40	.50	.60	.70	.80	.90	1.00
.35	3 Min.	.10	.45	.55	.65	.75	.85	.95	1.05
.40	3 Min.	.10	.50	.60	.70	.80	.90	1.00	1.10
.45	3 Min.	.15	.60	.75	.90	1.05	1.20	1.35	1.50
.50	3 Min.	.15	.65	.80	.95	1.10	1.25	1.40	1.55
.55	3 Min.	.15	.70	.85	1.00	1.15	1.30	1.45	1.60
.60	3 Min.	.20	.80	1.00	1.20	1.40	1.60	1.80	2.00
.65	3 Min.	.20	.85	1.05	1.25	1.45	1.65	1.85	2.05
.70	3 Min.	.20	.90	1.10	1.30	1.50	1.70	1.90	2.10
.75	3 Min.	.25	1.00	1.25	1.50	1.75	2.00	2.25	2.50
.80	3 Min.	.25	1.05	1.30	1.55	1.80	2.05	2.30	2.55
.85	3 Min.	.25	1.10	1.35	1.60	1.85	2.10	2.35	2.60
.90	3 Min.	.30	1.20	1.50	1.80	2.10	2.40	2.70	3.00
.95	3 Min.	.30	1.25	1.55	1.85	2.15	2.45	2.75	3.05
$1.00	3 Min.	.30	1.30	1.60	1.90	2.20	2.50	2.80	3.10

And thereafter increasing in 5 cent steps.

And thereafter 3 minutes for all rates.

And thereafter one-third the initial rate to the nearest multiple of 5 cents, but not more than one-third the initial rate.

And thereafter in accordance with the above applied system of computation, for each higher rate and for each additional overtime period or fraction thereof.

*Where Person-to-Person calls are accepted at these rates the initial period is 3 minutes and the overtime period is one minute.

[fol. 51] Telegraph and Telephone Service

Order No. 2797—February 17, 1919

Order No. 2495 issued by me on December 13th, 1918, provided certain charges for classes of telephone toll service to be effective January 21, 1919.

1. To meet public demand for particular person, messenger and appointment calls on short haul toll messages and which in the interest of the public service it is desirable to furnish, the following schedule will become effective February 21, 1919, by all companies furnishing telephone toll service to the public:

For distance of twelve miles or less, station-to-station rate is 10 cents.

The completed person-to-person rate is 15 cents.

Completed appointed and messenger rate is 20 cents.

The report charge is 5 cents.

The initial period for person-to-person messages at an initial rate of 15 cents will be three minutes and the overtime rate will be 5 cents for each additional minute.

In the case of those routes where the companies prior to January 21, 1919, provided station-to-station or two-number service exclusively, this practice shall be continued [fol. 52] hereafter where the distance is 12 miles or less, as the rates prescribed and under the conditions in Order No. 2495. In the case of those routes where there were in effect prior to January 21, 1919, station-to-station or two-number rates of 5 cents for distances not to exceed 6 miles the rate of 5 cents shall be continued.

2. In cases where it has been and is impracticable or impossible to build direct toll lines between communities on account of natural barriers such as mountains, waterways, and so forth, or in other extraordinary or exceptional cases, the operating board is authorized to suspend in part or entirely Order No. 2495, and to restore in whole or in part, the rates in effect immediately prior to January 21, 1919. Where such suspensions are made, the operating board shall make report of each case to me and such suspensions shall continue in effect until otherwise ordered by the operating board or the Postmaster General.

3. Nothing in Order No. 2495 or this bulletin shall be construed as affecting arrangements or basis of settlements between connecting companies in effect on January 20, 1919.

A. S. Burleson, Postmaster General.

[fol. 53] EXHIBIT "B"

The Pacific Telephone and Telegraph Company

Toll Rate Schedule Filed October 5, 1922

State of Washington

The Pacific Telephone and Telegraph Company State of Washington Inter-Exchange Rates for Intrastate Telephone Toll Messages.

I. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M. 21, 1922.

1. Station-to-Station Messages.—This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by the name of the subscriber of the called station.

[fol. 54] (b) Under this classification, orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling station. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-station service may be operated as a Number Service, in which case the called station may be desig-

nated only by number, through A and B switchboards, or through tandem operators, etc.; or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant condition, and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of method of operating station-to-station service will be determined solely as an operating arrangement, not in any any affecting rates or service; except that where the number method is employed orders will be accepted stating [fol. 55] only the telephone number of the called station.

(c) The charges for station-to-station messages shall not be "reversed," i. e., colected at the called station.

2. Person-to-Person Calls.—This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge") will be made in the following cases where it is impossible to establish communication between particular persons:

(1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within [fol. 56] one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion.)

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified

time)" or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station is absent at the calling station; provided that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

(5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

[fol. 57] 3. Appointment Calls.—Appointment calls are person to person calls, the order for which provides that communication is to be arranged for to take place at a specified time.

4. Messenger Calls.—Messenger calls are person to person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.—Collect calls are person to person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Toll Rates for Intrastate Station to station Messages

Effective 12:01 A. M., —— 21, 1922, the following initial period rates are established for toll messages where the distance between exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

For distances more than	But not more than	Initial rate
0 Miles	12 Miles	$0.10
12 "	18 "	.15
18 "	24 "	.20
24 "	32 "	.25
32 "	40 "	.30

[fol. 58] The following initial period rates are established for station to station toll mesages for all distances in excess of 40 miles by direct air line measurement:

For distances more than	But not more than	Initial rate
40 Miles	48 Miles	$0.35
48 "	56 "	.40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing section 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the [fol. 59] northwestern point of the International boundary line in the Straits of Georgia.

III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M., —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates between the same points, in accordance with the Schedule of Computed Rates for Person to Person, Appointment and Messenger Toll Calls, attached hereto, but no person to person rate shall be less than 15 cents.

2. In those cases where person-to person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station to station messages between the same points, in accordance with the Schedule of Computed Rates for Person to Person, Appointment and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

[fol. 60] 3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station to-station messages between the same points in accordance with the Schedule of Computed Rates for Person to Person, Appointment and Messenger Toll Call, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person to person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

IV. Standard Toll Night Rates

Effective 12:01 A. M., ——— 21, 1922, the following reductions shall be effective in the rates and charges for station to station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent less than the regular day rates, in

accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

[fol. 61] 2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station to station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

V. Initial Periods, Overtime Periods and Overtime Rates

Effective 12:01 A. M. —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification, Initial Period, Overtime Period

Station Station	3 Minutes	1 Minute
Person Person	2 Minutes	1 Minute
Messenger and appointment	2 Minutes	1 Minute

[fol. 62] The overtime rates shall be—

Station to station

Where the initial rate is	Overtime rate per period
$0.10	$0.05
.15	.05
.20	.05
.25	.05
.30	.10
.35	.10
.40	.10
.45	.15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

Person-to-Person and Messenger and Appointment

Where the initial rate is	Overtime rate per period
*$0.15	$0.05
.20	.10
.25	.10
.30	.15
.35	.15
.40	.20
.45	.20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

[Fed 63] Schedule of Computed Night Rates for Station-to-station Toll Messages

When the day rate is	The rate between 8:30 P. M. and 12:30 midnight is	The rate between 12 midnight and 4:30 A. M. is
$ .10	Day Rate	Day Rate
.15	Day Rate	Day Rate
.20	Day Rate	Day Rate
.25	Day Rate	Day Rate
.30	.25	.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40

*Minimum Messenger and Appointment Rate 20 cents.

When the day rate is	The rate between 8:30 P. M. and 12:00 midnight is	The rate between 12 midnight and 4:30 A. M. is
$1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5 cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[fol. 64] Schedule of Computed Rates for Person-to-Person Appointment and Messenger Toll Calls

When the station-to-station day rate is—	The completed person-to-person rate is—	The completed appointment and messenger rate is—	The report charge is—
$ .10	$ .15	$ .20	$ .05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.60	.10
.45	.55	.65	.15
.50	.60	.75	.15
.55	.65	.80	.15
.60	.75	.90	.15
.65	.80	.95	.20
.70	.85	1.05	.20
.75	.90	1.10	.20
.80	1.00	1.20	.20
.85	1.05	1.25	.25
.90	1.10	1.35	.25
.95	1.15	1.40	.25
1.00	1.25	1.50	.25
1.05	1.30	1.55	.30
1.10	1.35	1.65	.30
1.15	1.40	1.70	.30
1.20	1.50	1.80	.30
1.25	1.55	1.85	.35
1.30	1.60	1.95	.35
1.35	1.65	2.00	.35
1.40	1.75	2.10	.35
1.45	1.80	2.15	.40
1.50	1.85	2.25	.40
1.55	1.90	2.30	.40

When the station to station day rate is—	The completed person to person rate is—	The completed appointment and messenger rate is—	The report charge is—
1.60	2.00	2.40	.40
1.65	2.05	2.45	.45
1.70	2.10	2.55	.45
1.75	2.15	2.60	.45
1.80	2.25	2.70	.45
1.85	2.30	2.75	.50
1.90	2.35	2.85	.50
1.95	2.40	2.90	.50
2.00	2.50	3.00	.50
And thereafter increasing in 5 cent steps.	And thereafter 25% in addition to the station to station day rate. When the station to station day rate is not evenly divisible by 4, 25% in addition to the station to station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50% in addition to the station to station day rate. When the station to station day rate is not evenly divisible by 2, 50% in addition to the station to station day rate, computed to the next lower multiple of 5 cents.	And thereafter one fourth the station to station day rate. When the station to station day rate is not evenly divisible by 4, one fourth the station to station day rate computed to the next higher multiple of 5 cents, but no report charge will exceed $2.00

[fol. 65] EXHIBIT "C"

The Pacific Telephone and Telegraph Company Exchange Rates—Seattle, Tacoma, Washington. Filed September 20, 1922, and Not Withdrawn

W. U. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$12.00	$12.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten Party Line (See Section 5)	3.50	3.75

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-Public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .25	$*	$ .05
[fol. 66] *25c per month additional.			
Extension (with or without bell) per month	1.00	1.25	....

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.75	$5.00
Two-party Line	4.00	4.25
Four-party Line	3.25	3.50
Extension (with or without bell)	.75	1.00
Suburban Service—Two Party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station..... $15.00 per year

Issued: October 2, 1922. Effective: November 1, 1922.
Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.
P. H. Coolidge, General Commercial Superintendent.

W. U. P. W. No. 3, Section 1

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule

Exchange: Tacoma, Pierce County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Two Party Line (See Section 3)	3.50	3.75

[fol. 67] **Business—Measured Service**

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.30	$...*	$.05
Extension (with or without bell) per month	1.00	1.25	...

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two party Line	3.25	3.50
Four party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban Service—Two Party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Farmer Line Service (See Section 3), each station $15.00 per year.

Issued October 2, 1922. Effective November 1, 1922.
Cancels and supersedes Exchange Rate Schedule effective March 1, 1919.
P. H. Coolidge, General Commercial Superintendent.

*25c per month additional.

[fol. 68] W. D. P. W. No. 3, Section 2

The Pacific Telephone and Telegraph Company

Exchange Rate Schedule—Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private branch exchange service subject to the following conditions:

(a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

(b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission, supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchange service at published rates.

(2) To pay the hotel a commission on exchange and interexchange messages originating at guest room and lobby stations and charged to the hotel.

[fol. 69] Switchboard with battery power ringing circuit, position dial, switchboard telephone, each position—

	Rate per month
Cordless type	$3 00
Non-multiple cord type:	
10 lines or less in use	5 00
11— 30 lines in use	6 00
31— 60 lines in use	7 00
61—100 lines in use	8 00
101—150 lines in use	9 00
151—200 lines in use	10 00
201—260 lines in use	11 00
261—320 lines in use	13 00
Multiple cord type:	
Each position with not to exceed one multiple jack per line	15 00
Each additional strip of ten multiple jacks or portion thereof	30

(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:

		Rate per month
Each station without dial	Wall Set	1 00
	Desk Set	1 25
Each station, with dial	Wall Set	1 25
	Desk Set	1 50

Stations outside premises in which switchboard is located, see Mileage Rates—Section 3:

(b) Stations in guest rooms and lobby:

Each station, without dial—	Wall Set	50
	Desk Set	75
Each station, with dial—	Wall Set	75
	Desk Set	1 00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

[fol. 70] (c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management.

Outgoing trunk lines only.

Individual line business unlimited rate.

Tie lines between separate switchboards—See Mileage Rates, Section 3.

Bothway trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the central office shall be five cents except that in those cases where the additional service rendered the public at the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accepted by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations cannot be connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate area, see Mileage Rates, Section 3.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and Supersedes Exchange Rate Schedule effective March 1, 1919.

P. H. Coolidge, General Commercial Superintendent.

[fol. 71] EXHIBIT "D"

Findings of Fact, Order, and Opinion, Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON EX REL. The City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY AND HOME Telephone and Telegraph Company of Spokane, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

[fol. 72] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Woman's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, and investigation and study of the entire system of the Pacific Telephone and Telegraph Com-

pany in the state of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co- [fol. 73] operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking cooperation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

[fol. 74] On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to [fol. 75] the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February

26 at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the [fol. 76] January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men ap- [fol. 77] peared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

All the complaints were consolidated for the purpose of hearing and the hearings were joint hearings under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each.)

Findings of Fact

I

Rate Base

Finding:

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

[fol. 78] Discussion:

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original valuation proceeding.

As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, [fol. 79] but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange

or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services ren-[fol. 80]dered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Con-

struction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double [fol. 81] earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly [fol. 82] in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in com-

pleted plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capi- {fol. 83} talize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include the interest accretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Depreciation

Finding:

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two years from April 1st, 1923.

[fol. 84] Discussion:

One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replacements, has been $20,137,489.00, leaving a balance of $21,074,718.00, less certain expenditures for extraordinary repairs and other unusual items. In other words, the replacement ex-[fol. 85] penditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the state of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating this to State of Washington on the basis of plant values, the balance for Washington was $2,418,457.00. Had the com-

pany adopted a three and one half per cent rate of depreciation at the beginning of the year 1915, and debited the depreciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits to the depreciation reserve, for Washington, and debiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or nearly one third of the depreciable plant value.

We have found the property of respondents in the State of Washington to be about 85 per cent physical condition.

Under the view expressed by the witness referred to, the depreciation reserve should be approximately 15 per cent [fol. 86] of the depreciable property, where the same is found to be 85 per cent physical condition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balance, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922, B. P. 553, decided by Wisconsin Railroad Commission, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

"It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one half per cent of the depreciable property would have, so far as experience at present shows, been ample to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this discussion relates. The use of three and one-half per cent for [fol. 87] the purpose of this case is based upon the assump-

tion that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, durable and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any saving in the way of lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply justified. In the Wisconsin case the reduction was not limited to a specified period.

[fol. 88] Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties, under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, which would be binding upon a state regulatory body in the regulation of purely intrastate traffic, we believe that the results of this investigation will be of immense value in arriving at correct methods of determining depreciation and for this reason have limited the rate herein

prescribed to a two year period. The final determination of the I. C. C. should be announced within that time.

We are convinced, that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to re- [fol. 89] duce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than necessary, and we are merely reducing the flow until the proper level is reached.

III

The Four and One-half per Cent Contract Licensee Revenue, Dr.

Finding:

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

[fol. 90] Discussion:

This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent of substantially all of their gross operating revenue for

certain rights and services. We have no power to prevent any public utility from entering into a contract with a parent company to share with it any portion of its profits. We have the right, however, to say whether such share or any part thereof shall be treated as an operating expense. Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value of the service rendered or the reasonable rental of the equipment furnished rather than upon a percentage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one-half per cent of the increase will accrue [fol. 91] to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of additional revenue, and the local company will receive no more from the parent company than it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It gives rise to suspicions of concealment and dishonesty in every hearing in which it is involved. Not having power to annul it we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and Telegraph Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned, and present skillful expositions of its provisions, and undertake to justify its existence and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that

[fol. 92] establish wholesome public relations should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the public Utilities Commission of Michigan, less than a year ago, the Commission said, "The four and one-half per cent contract between the American Telephone and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arms length but one between the superior and inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its child. The contract is in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers, because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They [fol. 93] exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them. Under the law of this state the four and one-half per cent contract is at least presumptively void."

Substantially the same relations exist between the respondents in this case and the American Telephone and Telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653.00. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allow-[fol. 94] ance of something like two per cent instead of four and one-half per cent as provided in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the contract is fundamentally wrong and condemned specifically by the Supreme Court of the United States. The company applies the percentage to certian gross revenues received by the applicant. The more revennes the more the charge against revennes for the benefit of the American Company, which method of calculation constitutes a circle,—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

[fol. 95] In the case of the City of Houston v. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinion 1921-22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made as an operating expense under this contract the results would not differ materially.

The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

IV

Machine Switching Project

Finding:

We find that the installation of machine switching in Seattle is justified.

[fol. 96] Discussion:

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, if any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought about by the installation of machine switching. In addition to somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institute of Electrical Engineers, page 1571, where the following statement appears:

"Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence today, for this movement is twenty-seven years old. Five exchanges formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expenses is as follows:

[fol. 97]	Manual	Automatic
Total operating and maintenance expenses per year	$552,600 00	$136,800 00
Average per line per year	11 77	2 92
Average per telephone per year	8 50	2 11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation. We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result.

The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine switching devices are superior from the standpoint of economy and efficiency. They are a later and somewhat costlier product, and we assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching devices in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

[fol. 98] In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economies, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as:

1. Fluctuations in service.
2. Impairment of service by epidemics, strikes, etc.
3. The mistranslation of calling subscribers' desires.

V

Return

Finding:

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views [fol. 99] heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

Statement of Operating Income and Rate of Return

Estimate for Year 1923

	Present rates	Proposed rates
Revenues		
1. Exchange Service Revenues	$8,642,437.00	$8,434,253.00
2. Toll Service Revenues	2,350,000.00	2,732,358.00
3. Miscl. Operating Revenues	308,004.00	308,004.00
4. Total Tel. Oper. Revenue	$9,300,441.00	$11,474,615.00
Expenses		
5. Ordinary Repairs	$1,514,153.00	$1,514,153.00
6. Station Removals and Changes	207,385.00	207,385.00
7. Depreciation	1,070,337.00	1,070,337.00
8. Traffic Expense	2,642,731.00	2,642,731.00
9. Commercial Expense	885,011.00	885,011.00
10. General & Miscl. Expense	234,959.00	234,959.00
11. Rents	79,959.00	79,959.00
12. Uncollectible Revenues	35,618.00	48,597.00
13. Taxes	485,617.00	658,057.00
14. License Revenue—Dr.	161,653.00	161,653.00
15. Total Tel. Oper. Expense	$7,357,714.00	$7,542,993.00
16. Operating Income	$1,942,727.00	$3,931,712.00
17. Int. during Constr.—Accrued	148,122.00	148,122.00
18. Adjusted Operating Income	$2,090,849.00	$4,079,834.00
19. Rate Base	34,780,625.00	34,780,625.00
20. Per Cent Earned	6.01	11.73

NOTE.—The rate base above is the estimated average plant value for year 1923, plus working capital.

Discussion:

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

[fol. 100] Whatever saving can be made through the machine switching program, which we feel will soon be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

VI

Existing Rates

Finding:

We find that the existing rates are just, fair, reasonable and sufficient.

VII

Proposed Rates

Finding:

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

VIII

Decrease in Rates

Finding:

The evidence does not justify any reduction in rates at this time.

[fol. 101]

IX

Reparation

Finding:

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the

suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petitions to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

[fol. 102] Discussion:

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope if not a promise that when conditions returned to normal and the period of inflation had passed rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now come the respondents when we had dared hope that our predictions might be realized and ask for startling increases. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of popular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the [fol. 103] Burleson rates and the general telepone rate level has been higher in the State of Washington than in adjoin-

ing states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates.

If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

2. That the annual depreciation allowance be and the same is hereby fixed at 3½ per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and Telegraph Company under said 4½ per cent [fol. 104] contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness the Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, by E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation.

Attest: J. H. Brown, Secretary.

[fol. 105] EXHIBIT "E"

Dissenting Opinion Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works, of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rates regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

[fol. 106] BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON EX REL. the City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME Telephone and Telegraph Company of Spokane, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant; PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

[fol. 107] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic

Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint, challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company.)

The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a consulting telephone engineer with twenty-seven years' experience in the construction, operation and [fol. 108] engineering of independent telephone properties employed by the Department as a special engineer, were forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the mayor, council or commission and city attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations co-operate with us in this work, rendering such aid or assistance as possible. These letters and complaints were mailed to the authorities of more than one hundred cities and towns.

On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addi-
[fol. 109] tion thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently and on or about March 31, 1922, the City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case, Mr. E. D. Ridley, a well qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

Mr. Ridley and Mr. L. P. Hockett, utility engineer and accountant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check, examination and survey was made in the State of Washington, particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent tele-
[fol. 110] phone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules, proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedule as directed, and concurrently therewith filed

with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, cor- [fol. 111] porations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

[fol. 112] At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings except the one held at Olympia, were held in the assembly room of the respective commercial clubs

or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and [fol. 113] to the matters to be considered at that time and place. The greater part of these notices were sent to business and professional men in the city of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although some 2,300 notices of hearings and personal letters were written to these complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration, and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce, namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

[fol. 114] At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

The investigation and hearings in this case have been the most comprehensive ever made by the Public Service Commission or the Department of Public Works of

Washington and have extended over a period of 14 months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of closest cooperation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents, data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities, with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane, stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Pub-
[fol. 115] lic Works showed a spirit of cooperation with Spokane and Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

Findings of Fact

I

Rate Base

Finding:

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the State of Washington, including the Spokane Exchange, used and useful in public service was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion:

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

[fol. 116] Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is [fol. 117] treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making

purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

[fol. 118] Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base, but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages [fol. 119] 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that if the company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an [fol. 120] allowance for cash materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds

employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving and earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

[fol. 121] The rate of return from operation seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating income the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more and the company if it be less, than the rate of return from operations.

II

Rate of Return—(Earnings)

Finding:

That under the rates applicable during the past seven years the Pacific Telephone and Telegraph Company in the State of Washington, after paying operating expenses, taxes, licensee revenue debtor, and setting aside depreciation, has shown an annual rate of return as follows:

1915	1916	1917	1918	1919	1920	1921	1-1-to 6-30-22 (annual)
1.84%	3.40%	3.31%	3.13%	4.67%	4.09%	3.52%	3.35%

and that said rate of return during the entire period has been unfair, unjust, unreasonable and less than sufficient.

[fol. 122] That the estimated rate of return of the Pacific

Telephone and Telegraph Company for the State of Washington for the year 1923 under the rate proposed by the Companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

That under the rates fixed and allowed by this order, the rate of return will be 7.37 per cent upon the rate base herein established.

Discussion:

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximating 8% upon the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in the telephone plant. As testified on cross-examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depend-[fol. 123] in upon the nature or class of business in which the investment was made.

For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921, and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[Vol. 124] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052 82	$8,114,245 13	$4,165,420 49
Deductions from Revenues:			
2. Telephone Operating Expenses (excl. Dep.)	4,716,709 05	5,043,458 88	2,573,994 76
3. Taxes Assignable to Operations	600,045 53	543,449 27	262,310 90
4. Uncollectible Operating Revenues	17,321 26	29,028 68	17,061 75
5. Depreciation (on Depreciable Property)	1,177,558 87	1,321,585 78	727,295 13
6. Licensee Revenue—Dr.	327,106 58	342,658 03	173,421 04
7. Total Deductions from Revenue	$6,838,741 29	$7,280,180 64	$3,754,083 58
8. Operating Income	915,311 53	834,064 49	411,336 91
9. Interest during Construction	17,959 48	90,491 52	97,965 71
10. Adjusted Operating Income	$933,271 01	$924,556 01	$509,302 62
11. Rate Base (Incl. C. I. P.)	$22,821,159 54	$26,232,691 37	$30,425,113 89
12. Rate of Return	4 09%	3 52%	3 35%

NOTE.—Line 11—Amounts are average for the period hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 125] 1. Telephone Operating Revenues.—This the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses. (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The Department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reserve our former holding and practice in this regard, and to follow the law as definitely settled by the courts, [fol. 126] which is, that federal income tax is properly deductible from operating revenues.

Consolidated Gas Company of New York vs. Newton, 267 Federal 231.

Newton vs. Consolidated Gas Company, 42 Supt. Ct. 264.

Galveston Electric Company vs. Galveston, 66 Law Ed. 382.

Reduced Rates 1922—I. C. C. 683.

4. Uncollectible Operating Revenue.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciations (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce

Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, catastrophies, etc. These charges are carried to a depreciation reserve, and the costs of all replacements of plant units, instead of being included in the ordinary re- [fol. 127] pairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage necessary in the case of another exchange, due to a possible difference in the character of the physical property contained in each; yet at the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of a state, where climatic and other conditions are not the same.

The question here involved and to be determined is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

[fol. 128] Companies	5.75%	
City of Seattle	5.88%	(exchange plant only)
Department's Engrs.	5.25%	

In Case No. 4747, Public Service Commission of Washington et al. vs. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the com-

pany at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Cause No. 4747, depreciation percentages were allowed by us in the following cases:

ause No. 5040, City of Port Angeles vs. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club vs. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

Cause No. 5127, Commission vs. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 com- [fol. 129] mission decisions and eight court decision.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies generally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.29% to a maximum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty cases the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 5.972%. It will also be noted that in ninety of the 112 cases reported the depreciation allowance fell between 5% and 7%.

[fol. 130] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5 50
Arizona	PUR1920B	411	6 00
Arkansas	PUR1921B	516	6 40
California	PUR1915F	1014	5 50
California	PUR1922A	853	5 50
California	PUR1922C	97	3 28
Colorado	PUR1917B	198	5 65

Jurisdiction	Citation		Rate fixed
Georgia	PUR1921C	833	5 11
Hawaii	PUR1921B	209	6 80
Idaho	PUR1916C	438	6 07
Idaho	PUR1920E	321	6 00
Illinois	PUR1915D	646	5 00
Illinois	PUR1916B	318	7 00
Illinois	PUR1916D	781	6 58
Illinois	PUR1917A	658	6 00
Illinois	PUR1917B	368	6 00
Illinois	PUR1918B	172	5 50
Illinois	PUR1918E	74	5 50
Indiana	PUR1915E	23	5 00
Indiana	PUR1917F	209	4 50
Indiana	PUR1918C	489	5 00
Indiana	PUR1918E	859	5 00
Indiana	PUR1918E	669	5 00
Indiana	PUR1920C	209	5 00
Indiana	PUR1920C	854	5 00
Indiana	PUR1919E	504	5 00
Indiana	PUR1920A	422	5 00
Indiana	PUR1920B	813	5 00
Indiana	PUR1920D	83	5 00
Kansas	PUR1922E	46	5 00
Kansas	PUR1915B	507	6 00
Kansas	PUR1918C	55	6 50
Kansas	PUR1918C	777	5 72
Louisiana	PUR1922A	321	4 36
Maine	PUR1922E	86	5 00
[fol. 131] Maryland	PUR1920C	386	3 32
Michigan	PUR1916C	925	6 25
Michigan	PUR1921C	545	5 00
Michigan	PUR1921E	308	5 00
Minnesota	PUR1923A	30	4 00
Minnesota	PUR1916C	141	8 94
Missouri	PUR1921C	733	4 50
Missouri	PUR1915C	366	6 50
Missouri	PUR1920E	59	7 00
Missouri	PUR1919A	659	5 50
Nebraska	PUR1922A	773	6 00
Nebraska	PUR1915E	57	6 00
	PUR1919A	35	6 00

Jurisdiction	Citation		Rate fixed
New Hampshire	PUR1918F	592	7 00
New York	PUR1916B	940	5 80
New York	PUR1920D	529	5 66
North Dakota	PUR1921E	567	6 00
North Dakota	PUR1922E	602	5 00
Ohio	PUR1922A	155	5 00
Oregon	PUR1915F	290	2 39
Oregon	PUR1919D	345	3 55
South Dakota	PUR1915A	562	7 00
South Dakota	PUR1915B	223	7 00
South Dakota	PUR1915E	516	6 00
South Dakota	PUR1916A	364	7 00
South Dakota	PUR1916D	603	6 00
South Dakota	PUR1919B	734	7 00
South Dakota	PUR1922D	769	4 00
Utah	PUR1918C	566	6 50
Virgina	PUR1922A	756	5 50
West Virginia	PUR1921B	97	6 10
Wisconsin	2WRCR	105	3 67
Wisconsin	2WRCR	358	8 00
Wisconsin	2WRCR	427	10 00
Wisconsin	2WRCR	546	7 00
Wisconsin	3WRCR	117	8 00
Wisconsin	3WRCR	412	8 00
Wisconsin	3WRCR	452	8 00
Wisconsin	4WRCR	1	8 00
Wisconsin	4WRCR	259	7 50
Wisconsin	4WRCR	370	7 00
Wisconsin	4WRCR	407	7 00
Wisconsin	4WRCR	414	7 00
[fol. 132] Wisconsin	6WRCR	211	8 00
Wisconsin	6WRCR	419	6 50
Wisconsin	6WRCR	549	6 50
Wisconsin	6WRCR	573	6 50
Wisconsin	7WRCR	428	7 00
Wisconsin	7WRCR	608	7 00
Wisconsin	8WRCR	92	6 50
Wisconsin	9WRCR	383	6 50
Wisconsin	9WRCR	489	6 07
Wisconsin	11WRCR	180	6 50
Wisconsin	11WRCR	402	7 00

Jurisdiction	Citation		Rate fixed
Wisconsin	11WRCR	499	6 50
Wisconsin	11WRCR	666	6 52
Wisconsin	13WRCR	540	6 50
Wisconsin	14WRCR	157	7 00
Wisconsin	14WRCR	594	6 50
Wisconsin	15WRCR	182	9 00
Wisconsin	15WRCR	552	7 00
Wisconsin	16WRCR	402	6 67
Wisconsin	16WRCR	473	6 50
Wisconsin	16WRCR	758	7 00
Wisconsin	PUR1916C	1020	5 00
Wisconsin	PUR1916D	631	6 50
Wisconsin	PUR1917A	439	5 17
Wisconsin	PUR1917C	507	5 50
Wisconsin	PUR1917E	540	6 00
Wisconsin	PUR1919D	969	6 00
Wisconsin	PUR1920C	1019	6 00
Wisconsin	PUR1921E	171	4 58
Wisconsin	PUR1922A	164	6 00
Wisconsin	PUR1922B	91	5 00
Wisconsin	PUR1919F	92	5 21
Wisconsin	PUR1922B	553	3 50
Wisconsin	PUR1922D	368	5 00

The following court decisions also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.

Railroad Company v. Richmond, 96 U. S. 521.

[fol. 133] Munn v. Illinois, 94 U. S. 133.

Cumberland Telephone and Telegraph Company v. Louisville, 187 Federal 637.

Cumberland Telephone and Telegraph Company v. Memphis, 183 Federal 875.

Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.

Home Telephone and Telegraph Company v. Carthage, 139 S. W. 547.

Bell Telephone Company v. Houston, Texas, P. U. R. 1922D, 793.

6. Licensee Revenue Debtor (4½% Contract).—This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane, whereby the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely: 1st, Subscribers' Station Revenues; 2nd, Public Pay Station Revenues; 3rd, Private Exchange Line Revenues, and 4th, Message Toll Revenues, less Uncollectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the American Telephone and Telegraph Company supplies at all times to the Pacific Com- [fol. 134] pany and the Home Company certain instrumentalities, services, etc. These instrumentalities and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standardized, new and improved apparatus and methods developed through research and experimental work by the American Company.

4. A guarantee of freedom from royalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted.

6. Advice and assistance in general engineering, plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

[fol. 135] 7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plan for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters and Induction Coils.)—It is conceded in this case, by all parties, that should the only service performed by the American Company be the so-called instrument service, the annual charges therefor which might properly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four and one-half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under the contract. It is our opinion that the value of the services rendered by the American Company ex-
[fol. 136] ceeds the amount paid therefor, and we accordingly, allow the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that four and one-half per cent of the revenues derived from increased rates is also fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract

which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and import- [fol. 137] ance of the exchange increases or grows. Therefor, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage system of computing compensation. Eleven states, although they have allowed the full amount, have [fol. 138] not approved the percentage method.

The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the home

office of the American Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before the Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al v. Pacific Telephone and Telegraph Company and the Postmaster General, and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a beneficial arrangement conducive to telephone development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

[fol. 139] And again in that same order, we find the following:

"Between the Bell system and its constituent companies there has for many years existed what is known as the four and one-half per cent (4½%) contract. This contract is recognized and made a part of the agreement between the Bell System and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company, and Southwestern Bell Telephone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed.

It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; [fol. 140] but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four and one-half per cent contract is discussed in detail, and approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent company" (The respondent company was in the position of the Pacific and Home companies here) "the entire telephone experience of the [fol. 141] world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the American Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.

"The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could

not be obtained any other way except in a central organization. It would be impossible to render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented [fol. 142] them to the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenues.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible from revenue in computing a rate of return.

8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting Item 7 from Item 1.

9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account. It is added to Item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

10. Adjusted Operating Income.—This item is merely the sum of Items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from the rate base figure in Finding I. The

amounts stated herein are average figures for the period and do not represent the rate base as of any specific date.

12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating Income by the [fol. 143] Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

III

Hotel Rates

Finding:

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for the service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding:

The charges for toll messages now made by the respondent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications:

1. The classes of service at present being given to be continued.

2. The distance or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and regulations, shall be similar to the present tariff [fol. 144] now in effect with the following exceptions:

a. The initial period for all station to station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one-third of the initial rate.

b. The initial period for all person to person, messenger and appointment intrastate messages shall be two minutes and the charge for each additional minute or fraction thereof shall be one-half of the initial rate.

c. If the initial rate for station to station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person to person, messenger or appointment calls is not evenly divisible by two, the charge for each additional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion:

As stated in our order suspending the company's proposed rates we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

[fol. 145] a. From facts thus far developed the Department is inclined to the view that property used and useful devoted to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

The changes above directed in the toll rate schedule will accomplish the result contemplated by the Department in its suspension order.

V

Exchange Rates

Finding:

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, un- [fol. 146] fair, unreasonable and more than sufficient. The exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair, reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the estimated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

[fol. 147] Rates—Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Two-party Line	5.50	5.75

Business—Measured Service

	Rate per month		Free exchange per month messages	Each additional exchange messages
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$ .05
Extension (with or without bell)	.75	1.00		

Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	$*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.25	$4.50
Two-party Line	2.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

[fol 148] Rates—Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$ .05
Extension (with or without bell)	.75	1.00		

Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	$*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

* 25¢ per month additional

[fol. 149] Rates—Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8 50	$8 75
Extension (with or without bell)	1 00	1 25
Suburban Service—Ten-party Line	3 50	3 75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5 50	$5 75	110	$ 05
Extension (with or without bell)	75	1 00		

Semi Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ 20	$*	$ 05

	Wall set	Desk set
Extension (with or without bell) per month	$1 00	$1 25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3 75	$4 00
Two-party Line	3 00	3 25
Four-party Line	2 50	2 75
Extension (with or without bell)	75	1 00
Suburban—Ten-party service	3 00	3 25

* 25c per month additional

[fol. 150] Hotel Private Branch Exchange Service Rates, Seattle Tacoma, and Spokane Exchange

Unlimited Service

Switchboard or Order Board, with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3 00
Non-Multiple Cord Type:	
10 lines or less in use	5 00
11- 30 lines in use	6 00
31- 60 lines in use	7 00
61-100 lines in use	8 00
101-150 lines in use	9 00
151-200 lines in use	10 00
201-260 lines in use	11 00
261-320 lines in use	13 00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15 00
Each additional strip of ten multiple jacks or portion thereof	30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with that Board

	Seattle	Tacoma	Spokane
Each station not in guest room, without dial—			
Wall Set	$1 25	$0 95	$1 00
Desk Set	1 50	1 20	1 25
Each station not in guest room, with dial—			
Wall Set	1 50	1 15	1 20
Desk Set	1 75	1 40	1 45

	Seattle	Tacoma	Spokane
Each station in guest room, without dial—			
Wall Set	75	55	60
Desk Set	1 00	80	85
Each station in guest room, with dial—			
Wall Set	1 00	75	80
Desk Set	1 25	1 00	1 05

Stations outside premises in which switchboard or order board is located—See Mileage Rates—Section 3.

Trunk lines to central office from switchboards or order boards. Each hotlway trunk line—Individual Line business rate plus $3.00. Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 151] Statement of Operating Income and Rate of Return Estimate for the year 1923

	Present rates	Company proposed rates	Department allowed rates
1. Operating Revenues	$9,300,411 00	$11,474,615 00	$10,751,350 00
Deduction from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889 00	5,603,889 00	5,603,889 00
3. Taxes Assignable to Operations	581,000 00	658,057 00	637,413 00
4. Uncollectible Revenues	35,618 00	48,367 00	44,445 00
5. Depreciation (on Depreciable Property)	1,674,024 00	1,674,024 00	1,674,024 00
6. Licensee Revenue—Dr.	386,170 00	386,170 00	386,170 00
7. Total Deductions from Revenues	$8,280,701 00	$8,370,507 00	$8,345,941 00
8. Operating Income	$1,019,740 00	$3,104,108 00	$2,405,409 00
9. Interest during Construction	148,122 00	148,122 00	148,122 00
10. Adjusted Operating Income	$1,167,862 00	$3,252,230 00	$2,553,531 00
11. Rate Base (incl. Const. Work in Progress)	$34,789,635 00	$34,789,635 00	$34,789,635 00
12. Rate of Return	3 36%	9 35%	7 34%

[fol. 152] Farmer Line Rates

Finding No. VI:

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standardize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the number of exchange station is—	The annual farmer line rate shall be—
Over 20,000	$15 00
10,000 to 20,000	11 00
5,000 to 10,000	8 00
3,000 to 5,000	6 00
2,000 to 3,000	5 00
1,000 to 2,000	4 00
500 to 1,000	3 50
Under 500	3 00

Reparation

Finding No. VII:

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

[fol. 153] Discussion:

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegraph Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the [fol. 154] suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the foregonig statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue, the same is hereby dismissed.

Order

It is hereby ordered:

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with [fol. 155] the findings of fact and directions herein contained; and that all rates, rules and regulations as amended or supplemented as herein found and ordered be, and they are hereby made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness the Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, by ——— ———, Director. Hance H. Cleland, Supervisor of Public Utilities. By ——— ———, Supervisor of Transportation.

Attest: ——— ———, Secretary.

[fol. 156] EXHIBIT "F"

The Pacific Telephone and Telegraph Company Exchange Rates—Seattle-Tacoma, Washington—Farmer Line Rates—Exchanges, State of Washington—Toll Rates, State of Washington, Set Out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities of Washington, in Case Numbers 4902 and 5344

Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10 50	$10 75
Extension (with or without bell)	1 00	1 25
Suburban Service—Ten party Line	3 50	3 75

Business—Measured Service

	Rate per month		Free each message per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6 50	$6 75	150	$ 05
Extension (with or without bell)	75	1 00	...	...

[fol. 157] Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ 20	$*	$ 05
	Wall set	Desk set	
Extension (with or without bell) per month	$1 00	$1 25	

*25c per month additional.

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c per month additional.

[fol. 158] Hotel Private Branch Exchange Service Rates

Seattle and Tacoma Exchanges

Unlimited Service

Switchboard or order board with battery power ringing circuit, position dial, switchboard telephone, each position.

	Rate per month
Cordless Type	$3 00
Non-Multiple Cord Type:	
10 lines or less in use	5 00
11-30 lines in use	6 00
31-60 lines in use	7 00
61-100 lines in use	8 00
101-150 lines in use	9 00
151-200 lines in use	10 00
201-260 lines in use	11 00
261-320 lines in use	13 00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15 00
Each additional strip of ten multiple jacks or portion thereof	30

Stations on premises in which switchboard or order board is located and connected with that board.

	Seattle	Tacoma
Each station not in guest room, without dial—		
Wall Set	$1 25	$0 95
Desk Set	1 50	1 20
Each station not in guest room, with dial—		
Wall Set	1 50	1 15
Desk Set	1 75	1 40
Each station in guest room, without dial—		
Wall Set	75	55
Desk Set	1 00	80
Each station in guest room, with dial—		
Wall Set	1 00	75
Desk Set	1 25	1 00

Stations outside premises in which switchboard or order board is located—See Mileage Rates—Section 3.

Trunk lines to central office from switchboards or order boards. Each bothway trunk line—Individual Line business rate plus $3.00. Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 159] Farmer Line Rates

Where the number of exchange station is	The annual farmer line rate shall be
Over 20,000	$15 00
10,000 to 20,000	11 00
5,000 to 10,000	8 00
3,000 to 5,000	6 00
2,000 to 3,000	5 00
1,000 to 2,000	4 00
500 to 1,000	3 50
Under 500	3 00

The Pacific Telephone and Telegraph Company, State of Washington, Inter-exchange Rates for Intrastate Telephone Toll Messages

1. Classification of Intrastate Toll Telephone Service

The following classes of telephone toll message service shall be furnished effective 12:01 A. M. —— 21, 1922.

1. Station-to-station Messages: This service shall be defined by the following conditions:

(a) Orders for station-to-station service shall specify the telephone station called, either by telephone number, or by [fol. 160] the name of the subscriber of the called station.

(b) Under this classification orders will not be accepted to establish communication between particular persons.

(c) The measurement of the duration of a station-to-station message for purposes of the application of rates shall begin at the moment when telephonic communication is established between the called and the calling stations. The term "station" for the purpose of this clause is defined to include a private branch exchange switchboard operator, in those cases where private branch exchange systems are involved in station-to-station service.

(d) Station-to-Station service may be operated as a Number Service, in which case the called station may be designated only by Number through A and B switchboards or through tandem operators, etc.; or it may be operated through toll switchboards, and technically known as an "AY" service, depending on the local circumstances as to operating conditions, plant conditions and the circumstances as to directory distribution and areas; and the more economical method will be employed in each case. The choice of method of operating station-to-station service will be determined solely as an operating arrangement, not in any way affecting rates or service; except that where [fol. 161] the number method is employed orders will be accepted stating only the telephone number of the called station.

(e) The charges for station-to-station messages shall not be "reversed," i. e., collected at the called station.

2. Person-to-person Calls.—This service shall be defined by the following conditions:

(a) Orders will be accepted to establish communication between specified persons.

(b) The measurement of the duration of a person-to-person message for the purpose of the application of rates shall begin at the moment when communication begins with or between the particular person or persons specified in the order; provided that certain report charges will be made under the conditions specified in the clause next below, where communication may not be established.

(c) Orders for person-to-person service shall be accepted only under the condition that a limited charge (to be known as "Report Charge,") will be made in the following cases

where it is impossible to establish communication between particular persons:

(1) When the order is to establish communication with a particular person in a given city, telephone address unknown, and the particular person can not be secured within [fol. 162] one hour (exclusive of any time during which "no circuits" or other cause prevent communication of the order to the distant city or exchange, or its completion.)

(2) When the designated person called refuses to talk.

(3) When the report is returned that the designated person called is "out" or "out and will return at (specified time,)" or "out and time of return unknown," "is absent from the city," and similar reports advising the calling subscriber of the facts ascertained when failure to complete the order is due solely to the circumstances of the called person or to fault in describing the location of the called person, and when all of the work preliminary to establishing communication with the called person is done.

(4) When communication between the designated persons can not be established because the designated person at the calling station is absent at the calling station; provided that no charge shall be made in such cases where the delay, if any, in establishing connection is greater than one hour.

(5) When the designated person at the calling station refuses to talk when the facilities for communication have been established.

3. Appointment Calls.—Appointment calls are person-to-person calls, the order for which provides that communica- [fol. 163] tion is to be arranged for to take place at a specified time.

4. Messenger Calls.—Messenger calls are person-to-person calls requiring the use of a messenger to secure attendance of a designated person at one of the public pay stations at the distant point.

5. Collect Calls.—Collect calls are person-to-person calls, the charges for which are "reversed," i. e., to be collected from the subscriber of the distant station at which the call is to be completed.

II. Toll Rates for Intrastate Station-to-station Messages

Effective 12:01 A. M. —— 21, 1922, the following initial period rates are established for toll messages where the distance between exchanges, or toll points, does not exceed 40 miles by direct measurement on a U. S. Government Post Route Map.

For distance more than	But not more than	Initial rate
0 Miles	12 miles	$0 10
12 "	18 "	15
18 "	24 "	20
24 "	32 "	25
32 "	40 "	30

The following initial period rates are established for station-to-station toll messages for all distances in excess [fol. 164] of 40 miles by direct air line measurement:

For distance more than	But not more than	Initial rate
40 Miles	48 Miles	$0 35
48 "	56 "	40

For each additional 8 miles or fraction thereof, 5 cents additional.

For the purpose of applying standard rates where the direct air line distance between points is in excess of 40 miles, distance shall be determined as the air line distance between the centers of blocks 7 miles square, within which the points of communication are located, and where the distance is in excess of 350 miles by the air line distance between the centers of sections 35 miles square.

The block and section scaling system for purposes of measuring toll rate distance between points more than 40 miles distant by direct measurement, shall consist of a grid containing sections 35 miles square, each section subdivided into 25 blocks seven miles square, so placed on a polyconic projection of a Government survey map of the United States that section lines coincide with a line drawn approximately north and south through the center of the United States and with a line at right angles thereto passing through the northwestern point of the International boundary line in the Straits of Georgia.

[fol. 165] III. Toll Rates for Other Classes of Toll Calls

Effective 12:01 A. M. —— 21, 1922, the following toll message rates are established for person-to-person calls, appointment calls, and messenger calls:

1. The initial period rates for person-to-person calls shall be approximately 25 per cent in addition to the station-to-station rates between the same points, in accordance with the Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, attached hereto, but no person-to-person rate shall be less than 15 cents.

2. In those cases where person-to-person calls are not completed and a report is made or the conditions are such as described in paragraph I, 2 (c) of this schedule a report charge shall be made of approximately one-fourth the initial rate for station-to-station messages between the same points, in accordance with the schedule of Computed Rates for Person to Person, Appointment and Messenger Toll Calls, attached hereto and hereby made a part of this schedule; but no report charge shall be less than 5 cents for any one call, nor more than $2.00.

3. The rates for appointment calls shall be approximately 50 per cent in addition to the rates for station-to-station messages between the same points in accordance with the [fol. 166] Schedule of Computed Rates for Person-to-Person, Appointment and Messenger Toll Calls, hereto attached and hereby made a part of this schedule; but in the case of an appointment call order, where the distant station is reached, whether the appointment be made or not, the Report Charge applicable in case of person-to-person calls between the same points shall be made.

4. The rates for messenger calls shall be the same as applied to appointment calls, between the same points, plus any charges that may be required for the service of messengers.

IV. Standard Toll Night Rates

Effective 12:01 A. M. —— 21, 1922, the following reductions shall be effective in the rates and charges for station-

to-station messages only, between the hours of 8:30 P. M. and 4:30 A. M.

1. Between the hours of 8:30 P. M. and 12 midnight, the night rates for station-to-station messages shall be approximately 50 per cent less than the regular day rates, in accordance with the Schedule of Computed Night Rates attached hereto and hereby made a part of this schedule, but no night rate shall be less than 25 cents.

2. Between the hours of 12 midnight and 4:30 A. M., the night rates shall be approximately 75 per cent less than the established day rates, in accordance with the Schedule of [fol. 167] Computed Night Rates attached hereto, and hereby made a part of this schedule; but no night rate shall be less than 25 cents.

3. For the purpose of applying night rates, the time of day at the point at which a station-to-station message originates shall be used.

4. Day rates only shall be employed between the hours of 4:30 A. M. and 8:30 P. M.

V. Initial Period, Overtime Periods, and Overtime Rates

Effective 12:01 A. M. —— 21, 1922, the following initial periods, overtime periods and overtime rates are established:

Classification	Initial period	Overtime period
Station-Station	3 minutes	1 minute
Person-Person	2 minutes	1 minute
Messenger and appointment	2 minutes	1 minute

The overtime rates shall be——

Station-to-Station

Where the initial rate is	Overtime rate per period
*$0 15	$0 05
15	05
20	05
25	05
30	10
35	10
40	10
45	15

and thereafter approximately one-third of initial rate and in no case more than one-third of the initial rate.

[fol. 168] Person-to-Person and Messenger and Appointment

Where the initial rate is	Overtime rate per period
$0 15	$0 05
20	10
25	10
30	15
35	15
40	20
45	20

and thereafter approximately one-half of the initial rate and in no case more than one-half of the initial rate.

*Minimum Messenger and Appointment Rate $0.20

Schedule of Computed Rates for Person to Person Appointment and Messenger Toll Calls

When the station to station day rate is—	The completed person to person rate is	The completed appointment and messenger rate is	The report charge is
$0.10	$0.15	$0.20	$0.05
.15	.20	.25	.10
.20	.25	.30	.10
.25	.30	.35	.10
.30	.40	.45	.10
.35	.45	.50	.10
.40	.50	.55	.10
.45	.60	.65	.15
.50	.65	.70	.15
.55	.70	.80	.15
.60	.75	.85	.15
.65	.80	.90	.20
.70	.85	.95	.20
.75	.90	1.05	.20
.80	1.00	1.10	.20
.85	1.05	1.20	.20
.90	1.10	1.25	.25
.95	1.15	1.30	.25
1.00	1.25	1.40	.25
1.05	1.30	1.45	.25
[Feb. 1920]			
1.10	1.35	1.45	.30
1.15	1.40	1.50	.30
1.20	1.50	1.60	.30
1.25	1.55	1.65	.35
1.30	1.60	1.70	.35
1.35	1.65	1.80	.35
1.40	1.75	1.90	.35
1.45	1.80	2.00	.40
1.50	1.85	2.05	.40
1.55	1.90	2.10	.40
1.60	2.00	2.20	.40
1.65	2.05	2.25	.45
1.70	2.10	2.30	.45
1.75	2.15	2.40	.45
1.80	2.20	2.45	.50
1.85	2.30	2.55	.50
1.90	2.35	2.60	.50
1.95	2.40	2.70	.50
2.00	2.50	2.80	.50
And thereafter increasing in 5 cent steps	And thereafter 25 per cent in addition to the station to station day rate. When the station to station day rate is not evenly divisible by 4, 25 per cent in addition to the station to station day rate, computed to the next lower multiple of 5 cents.	And thereafter 50 per cent in addition to the station to station day rate. When the station to station day rate is not evenly divisible by 2, 50 per cent in addition to the station to station day rate, computed to the next lower multiple of 5 cents.	And thereafter one-fourth the station to station day rate. When the station to station day rate is not evenly divisible by 4, one-fourth the station to station day rate computed to the next higher multiple of 5 cents, but no report charge will exceed $2.00.

Schedule of Computed Night Rates for Station-to-Station Toll Messages

When the day rate is—	The rate between 8:30 p. m. and 12 midnight is—	The rate between 12 midnight and 4:30 a. m. is—
$0.10	Day rate	Day rate
.15	" "	" "
.20	" "	" "
.25	" "	" "
.30	$0.25	$0.25
.35	.25	.25
.40	.25	.25
.45	.25	.25
.50	.25	.25
.55	.30	.25
.60	.30	.25
.65	.35	.25
.70	.35	.25
.75	.40	.25
[Rule 170 & 171]		
.80	.40	.25
.85	.45	.25
.90	.45	.25
.95	.50	.25
1.00	.50	.25
1.05	.55	.30
1.10	.55	.30
1.15	.60	.30
1.20	.60	.30
1.25	.65	.35
1.30	.65	.35
1.35	.70	.35
1.40	.70	.35
1.45	.75	.40
1.50	.75	.40
1.55	.80	.40
1.60	.80	.40
1.65	.85	.45
1.70	.85	.45
1.75	.90	.45
1.80	.90	.45
1.85	.95	.50
1.90	.95	.50
1.95	1.00	.50
2.00	1.00	.50
And thereafter increasing in 5-cent steps.	And thereafter one-half the day rate. When the day rate is not evenly divisible by 2, one-half the day rate, computed to the next higher multiple of 5 cents.	And thereafter one-fourth the day rate. When the day rate is not evenly divisible by 4, one-fourth the day rate, computed to the next higher multiple of 5 cents.

[File endorsement omitted.]

[fol. 172] In United States District Court

[Title omitted]

Answer to Amended and Supplemental Bill of Complaint—Filed February 19, 1925

The answer of Walter B. Whitcomb, as Director of Public Works of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of [fol. 173] Washington, and John H. Dunbar, Attorney General of the State of Washington, to the amended and supplemental complaint herein respectfully shows:

I

These defendants admit the allegations of Paragraph I of the amended and supplemental complaint.

II

These defendants admit the allegations of Paragraph II of the amended and supplemental complaint.

III

These defendants admit the allegations of Paragraph III of the amended and supplemental complaint.

IV

These defendants admit the allegations of Paragraph IV of the amended and supplemental complaint.

V

These defendants admit the allegations of Paragraph V of the amended and supplemental complaint, except that these defendants deny that the order of the Department of Public Works therein referred to is confiscatory of plaintiff's property or that they seek, or that either of them seeks to deprive plaintiff of its property without due process of law or to deny to plaintiff the equal protection

of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 174] VI

Answering Paragraph VI of the amended and supplemental complaint, these defendants admit that the Public Service Commission of Washington, on the 8th day of August, 1919, made a certain order relative to the rates and charges to be charged by the plaintiff on and after August 1, 1919, for exchange and intrastate toll telephone service within the state of Washington. These defendants further admit that the rates set forth in Exhibit "A" attached to the amended and supplemental complaint, are a portion of the rates referred to in said order of August 8, 1919, with respect to the particular classes set forth in said Exhibit "A." In explanation of said order of August 8, 1919, and the rates set forth in said Exhibit "A," these defendants allege that in July, 1918, the Postmaster General of the United States, by authority of a resolution of Congress and a proclamation of the President of the United States, in the exercise of the war powers of the Federal Government, took possession and assumed control and supervision of the telephone system of plaintiff. That during the period of such Federal control the Postmaster General authorized and placed in effect on the telephone system of plaintiff within the state of Washington, the rates set forth in said Exhibit "A." That on July 31, 1919, Federal control over the telephone system of plaintiff [fol. 175] ceased, and said telephone system was on said date restored to the supervision, operation, management and control of plaintiff. That on or about the 8th day of August, 1919, plaintiff filed with the said Public Service Commission of Washington an application petitioning said commission to continue in force on less than statutory notice, the rates theretofore authorized by the Postmaster General during the period of Federal control, which rates were the rates set forth in said Exhibit "A," which application was accompanied by a certain letter written by plaintiff to said Public Service Commission, bearing date of August 5th, 1919. That upon receipt of such application and letter, said Public Service Commission made and en-

tered an order granting said application and continuing in effect the said rates theretofore authorized by the Postmaster General, being the rates shown in Exhibit "A." The said application for the continuing of said rates, together with said letter of August 5, 1919, and the said order of the Department of Public Works of August 8, 1919, are filed herewith, marked Exhibit "C" and hereby expressly referred to and made a part hereof. The said order of August 8, 1919, in said Exhibit "C" is the same order as that referred to by plaintiffs in Paragraph VI of the amended and supplemental complaint.

[fol. 176]

VII

These defendants admit the allegations of Paragraph VII of the amended and supplemental complaint.

VIII

These defendants admit the allegations of Paragraph VIII of the amended and supplemental complaint.

IX

These defendants admit the allegations of Paragraph IX of the amended and supplemental complaint.

X

These defendants admit the allegations of Paragraph X of the amended and supplemental complaint.

XI

These defendants admit the allegations of Paragraph XI of the amended and supplemental complaint.

XII

As to the allegations of Paragraph XII, these defendants on information and belief deny that the cost to plaintiff of its property now being used or useful in furnishing its intrastate telephone and telegraph service to the public and exclusively devoted to the rendition of that service, was as

of the 31st day of December, 1922, in the State of Washington, not including Spokane, the sum of $27,594,800.00, [fol. 177] in the Seattle exchange, the sum of $16,928,567.00, and in the Tacoma exchange the sum of $2,874,647.00. These defendants on information and belief, deny that the property of the plaintiff in its said Seattle and Tacoma exchanges constitutes approximately seventy-two per cent (72%) of plaintiff's property in the state of Washington. These defendants on information and belief deny that the cost to plaintiff of its said property in the state of Washington, city of Seattle and city of Tacoma, is now somewhat in excess of said sums by reason of additions and betterments, in the meantime made to said property. These defendants deny that the cost to plaintiff of its said property in the state of Washington, city of Seattle and city of Tacoma, respectively, is substantially the rate base fixed by the Department of Public Works in its order of March 31, 1923, as of June 30, 1922, with additions and betterments thereto made since that time, after excluding from said rate base of the Department of Public Works the property of the plaintiff in the Spokane exchange and used in its interstate business. These defendants, on information and belief, deny that the present cost of reproduction of plaintiff's said property used in intrastate business, as of December 31, 1922, in the state of Washington, not including Spokane, is the sum of $45,210,899.00, in the city of Seattle, the sum of $27,017,522.00, and in the city of Ta- [fol. 178] coma, the sum of $4,981,176.00. These defendants on information and belief deny that the cost of reproduction of plaintiff's said property, used in intrastate business, less depreciation, as of the 31st day of December, 1922, is the sum of $41,332,741.00, for the state of Washington; the sum of $24,797,238.00, for the city of Seattle; the sum of $4,516,940.00, for the city of Tacoma. These defendants on information and belief deny that the fair and reasonable value of plaintiff's said property, used in intrastate business for the state of Washington, not including Spokane, is the sum of $33,488,264.00; for the city of Seattle the sum of $20,745,647.00, and for the city of Tacoma the sum of $3,441,043.00, as of the 31st day of December, 1922. These defendants on information and be-

lief deny that the property of the plaintiff in the cities of Seattle and Tacoma constitutes seventy-two per cent (72%) of the total fair value of plaintiff's property in the state of Washington. These defendants on information and belief deny that plaintiff's statements as to the cost of its respective properties, include nothing on account of franchises or going concern value.

On the contrary these defendants allege on information and belief, that the cost to plaintiff of its said property now being used or useful in furnishing intrastate telephone service to the public, as of December 31, 1922, was and now [fol. 179] is, for the state of Washington not including Spokane, not more than $22,850,000; for the city of Seattle not more than $12,310,000; for the city of Tacoma, not more than $2,750,000. That the property of plaintiff in the cities of Seattle and Tacoma, constitutes not more than sixty-six per cent (66%) of plaintiff's property in the state of Washington. That the cost of reproduction of plaintiff's said intrastate property, as of December 31, 1922, for the state of Washington, not including Spokane, is not more than the sum of $34,700,000; for the city of Seattle, not more than the sum of $18,700,000; and for the city of Tacoma, not more than $4,180,000. That the cost of reproduction of plaintiff's said intrastate property, less depreciation, as of December 31, 1922, for the state of Washington, not including Spokane, was not more than $29,500,000; for the city of Seattle, not more than $15,900,000; for the city of Tacoma, not more than $3,550,000. That the fair value of plaintiff's said intrastate property, as of December 31, 1922, for the state of Washington, not including Spokane, was not more than $22,500,000; for the city of Seattle, not more than $12,000,000, and for the city of Tacoma, not more than $2,700,000. That the value of plaintiff's said property in the cities of Seattle and Tacoma is not more than sixty-six per cent (66%) of the fair value of plaintiff's intrastate property in the state of Washington, [fol. 180] not including Spokane; that plaintiff's statements as to the costs of its respective properties include the sum of $850,000 franchise values for the state of Washington, not including Spokane; $400,000 franchise values for the city of Seattle, and $100,000 franchise values for the city of Tacoma. That the plaintiff's statements as to the cost

of its respective properties include for going concern value the sum of $1,500,000; for the state of Washington, not including Spokane, $850,000; for the city of Seattle; and $125,000 for the city of Tacoma.

XIII

As to the allegations of Paragraph XIII of the amended and supplemental complaint, these defendants deny that the plaintiff is entitled to earn not less than eight per cent (8%) of the fair and reasonable value of its property.

XIV

As to the allegations of Paragraph XIV of plaintiff's amended and supplemental complaint, these defendants deny on information and belief that plaintiff's intrastate telephone and telegraph business in the state of Washington has been conducted efficiently and economically during any of the times referred to in plaintiff's amended and supplemental complaint. These defendants allege that plaintiff's net earnings referred to in said paragraph are matters of conclusion from facts rather than matters of [fol. 181] fact capable of exact statement, and these defendants on information and belief, deny that plaintiff's net earnings on the cost and fair value of its property in the state of Washington, city of Seattle and city of Tacoma, respectively, are the percentages respectively set forth in said paragraph.

On the contrary, said defendants allege on information and belief, that said net returns, properly computed, will amount to a fair and reasonable return and will and do amount, for the state of Washington, to a sum not less than $2,000,000; for the city of Seattle a sum not less than $1,000,000, and for the city of Tacoma a sum not less than $222,000. These defendants, on information and belief, deny that the fair and reasonable value of plaintiff's property, used and useful in public service within the state of Washington, city of Seattle and city of Tacoma, respectively, is substantially or any in excess of its cost.

XV

These defendants deny on information and belief that during the years 1919, 1920, 1921 and 1922, plaintiff's rates

were not compensatory, or were less than just and reasonable rates, but on the contrary said defendants allege on information and belief that said rates for said period were compensatory, just and reasonable. These defendants allege, on information and belief, that the allegations in Paragraph XV of plaintiff's amended and supplemental [fol. 182] complaint, as to the differences between plaintiff's net revenues and eight per cent of the cost of its respective properties are conclusions from facts rather than matters of fact. These defendants deny on information and belief that the amounts by which the net revenue derived by the plaintiff from its telephone and telegraph business in the state of Washington and the cities of Seattle and Tacoma were less than eight per cent of the cost of the property used or useful in each case and exclusively devoted to the rendition of service within said state and for said cities are the amounts set forth in Paragraph XV of the amended and supplemental complaint, but on the contrary they allege on information and belief that the net returns of plaintiff properly computed do not differ in any respect from a fair and reasonable return.

XVI

These defendants, on information and belief, deny all of the allegations of Paragraph XVI of the amended and supplemental complaint, and on information and belief allege that if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial result will be a fair and reasonable return to the plaintiff.

XVII

These defendants admit the allegations of Paragraph XVII of the amended and supplemental complaint.

[fol. 183] XVIII

These defendants admit the allegations of Paragraph XVIII of the amended and supplemental complaint.

XIX

These defendants admit the allegations of Paragraph XIX of the amended and supplemental complaint.

XX

These defendants admit the allegation of Paragraph XX of the amended and supplemental complaint.

XXI

As to the allegations of Paragraph XXI of the amended and supplemental complaint, these defendants, on information and belief, deny that the cost to plaintiff of its property in the state of Washington, not including Spokane, now being used or useful in furnishing intrastate telephone and telegraph service to the public therein, and exclusively devoted to the rendition of such service was, as of December 31, 1923, $31,730,512, and as of July 31, 1924, the sum of $32,649,093. These defendants, on information and belief, deny that the cost to plaintiff of its property constituting its Seattle exchange now being used and useful in furnishing intrastate service to its subscribers and patrons therein, was, as of the 31st day of December, 1923, the sum of $19,547,304, and as of July 31, 1924, the sum of $19,750,-[fol. 184] 629. These defendants deny, on information and belief, that the cost to plaintiff of its property constituting its Tacoma exchange, now being used and useful in furnishing intrastate service to its subscribers and patrons therein, was, as of December 31, 1923, the sum of $3,035,-958, and as of the 31st day of July, 1924, the sum of $3,235,-660. These defendants, on information and belief, deny that plaintiff's said Seattle and Tacoma exchanges constitute seventy one per cent (71%) of plaintiff's property in the state of Washington as of December 31, 1923, and seventy per cent (70%) of said property as of July 31, 1924. These defendants, on information and belief, deny that the cost to plaintiff of its said property in the state of Washington, city of Seattle and city of Tacoma, respectively, now is somewhat in excess of the cost of said respective properties, as of July 31, 1924, on account of additions and betterments in the meantime made to said respective properties.

These defendants, on information and belief, deny that the fair and reasonable value of plaintiff's said property used in intrastate business for the state of Washington, not including Spokane, was, as of the 31st day of Decem-

ber, 1923, the sum of $37,623,977; for the city of Seattle the sum of $23,364,384, and for the city of Tacoma, the sum of $3,602,355, and that the said two cities constitute seventy-two per cent (72%) of the total fair value of plaintiff's [fol. 185] property in the state of Washington. These defendants deny, on information and belief, that the fair and reasonable value of plaintiff's said property, used in intrastate business, as of July 31, 1924, in the state of Washington, not including Spokane, was the sum of $38,542,558; for the city of Seattle the sum of $23,567,709, and for the city of Tacoma the sum of $3,802,057, and that the said two cities constitute approximately seventy-one per cent (71%) of the total fair value of plaintiff's said property of the state of Washington, as of said date.

These defendants deny, on information and belief, that plaintiff's statements in Paragraph XXI of the amended and supplemental complaint, as to the cost of its said respective properties as of the dates in said paragraph mentioned, include nothing on account of the item of franchises or the item known as "going concern value."

On the contrary, these defendants allege, on information and belief, that the cost to the plaintiff as of December 31, 1923, of its property now being used or useful in furnishing intrastate telephone service to the public as of December 31, 1923, was in the state of Washington, not including Spokane, not more than the sum of $27,500,000; for the city of Seattle not more than $15,000,000; for the city of Tacoma, not more than $2,800,000, and the cost of plaintiff's said property in said two cities constitutes sixty-seven per [fol. 186] cent (67%) of the total cost of plaintiff's said property in said state, as of said dates. These defendants allege, on information and belief, that the cost to plaintiff of its property, used and useful, in furnishing telephone and telegraph service to the public, as of July 31, 1924, in the state of Washington, not including Spokane, was not more than the sum of $30,000,000; for the city of Seattle, not more than $18,500,000, and for the city of Tacoma, not more than $3,000,000, the cost of plaintiff's said property in said two cities constituting sixty-nine per cent (69%) of the total cost of plaintiff's said property in the state of Washington, not including Spokane.

These defendants allege, on information and belief, that the fair and reasonable value of plaintiff's said property,

used in intrastate business as of December 31, 1923, in the state of Washington, not including Spokane, was not more than the sum of $27,200,000; for the city of Seattle, not more than $15,400,000, and for the city of Tacoma, not more than $2,750,000, and that the fair value of plaintiff's property in said two cities constitutes not more than sixty-seven per cent (67%) of the total cost of plaintiff's said property in the state of Washington, not including Spokane. These defendants allege, on information and belief, that the fair and reasonable value of plaintiff's said property, used and useful in intrastate service as of July [fol. 187] 31, 1924, in the state of Washington, not including Spokane, was not more than the sum of $30,000,000; for the city of Seattle, not more than $18,300,000, and for the city of Tacoma, not more than $2,950,000, plaintiff's property in the said two cities constituting sixty nine per cent (69%) of the total fair value of plaintiff's said property in the state of Washington, not including Spokane.

These defendants allege, on information and belief, that plaintiff's statements in Paragraph XXI of its amended and supplemental complaint, as to the costs of its respective properties, include the sum of $850,000 for franchise values and $1,500,000 for going concern value, for the state of Washington, not including Spokane; $400,000 franchise value and $850,000 going concern value for the city of Seattle; and $100,000 franchise value and $125,000 going concern value for the city of Tacoma.

XXII

As to the allegations of Paragraph XXII of plaintiff's amended and supplemental complaint, these defendants deny, on information and belief, that plaintiff's intrastate telephone and telegraph business in the state of Washington has been conducted efficiently and economically during any of the times referred to in said paragraph. These defendants allege that plaintiff's net earnings referred to in said paragraph are matters of conclusion from facts rather [fol. 188] than matters of fact, and these defendants, on information and belief, deny that plaintiff's net earnings on the cost and fair value of its property in the state of Washington, city of Seattle and city of Takoma, respectively, are the percentages respectively set forth in said paragraph.

On the contrary, these defendants allege, on information and belief, that said net returns properly computed will and do amount to a fair and reasonable return and will and do amount, for the year 1923, for the state of Washington, to a sum not less than $2,170,000; for the city of Seattle, a sum not less than $1,230,000; for the city of Tacoma, a sum not less than $220,000, and that plaintiff's net earnings from January 1, 1924, to August 1, 1924, on an annual basis, will and do amount, for the state of Washington, to a sum not less than $2,450,000; for the city of Seattle, a sum not less than $1,380,000; and for the city of Tacoma, a sum not less than $240,000.

XXIII

As to the allegations of Paragraph XXIII of plaintiff's amended and supplemental complaint, if the rates set forth in Exhibit "F" referred to therein, had been in effect for the year 1923, these defendants deny, on information and belief, that the return to plaintiff on the fair value and on the cost of its property, used and useful, in rendering intra- [fol 189] state telephone and telegraph service in the state of Washington, city of Seattle and city of Tacoma, respectively, would have been the percentages set forth in said paragraph. These defendants deny that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which plaintiff lawfully entitled. On the contrary, these defendants allege, on information and belief, that if the rates and charges in said Exhibit "F" had been in effect during the year 1923 plaintiff would have earned, upon the cost and fair value of its said property in said state and cities, respectively, not less than twelve per cent (12%). These defendants, on information and belief, allege that the rates and charges set forth in said Exhibit "F," which said rates and charges were put in effect under the injunctive order of July 23, 1924, are unjust, unreasonable, unlawful and excessive.

XXIV

As to the allegations in Paragraph XXIV of the amended and supplemental complaint, these defendants deny that, unless defendants are restrained and enjoined, the plain-

tiff, or any one on its behalf, by any attempt of these defendants to compel compliance with said order of March 31, 1923, or to enforce penalties or otherwise, will be forced to submit to confiscation of plaintiff's property without due process of law, or in violation of plaintiff's rights under [fol. 190] the Constitution of the United States, or will be subjected to great and irreparable loss and damage, and these defendants deny that plaintiff has no plain, speedy, or adequate remedy at law.

And for a further separate and affirmative answer and defense to said amended and supplemental complaint, these defendants allege and say:

I

These defendants allege that the intrastate property of the plaintiff in the state of Washington, city of Seattle and city of Tacoma, respectively, used and useful in rendering telephone and telegraph service to the public therein, is devoted in part to intrastate toll service and telegraph service, and in part to exchange services. These defendants allege that the amended and supplemental complaint contains no statements as to the alleged cost, cost of reproduction, cost of reproduction less depreciation or fair value of plaintiff's intrastate property in said state, or either of said cities, used and useful, respectively, in intrastate toll service, intrastate telegraph service or exchange service therein, and that said amended and supplemental complaint contains no statement as to the alleged gross receipts, gross expenditures or net revenues from the respective portions of its said property, used and useful, in rendering intrastate toll service, intrastate telegraph service or exchange serv- [fol. 191] ice in the said state or cities, respectively. Plaintiff, by its amended and supplemental complaint herein, seeks an increase in its intrastate toll rates throughout the state of Washington, and an increase in its exchange rates in the cities of Seattle and Tacoma. These defendants, on information and belief, allege that if the cost, fair value, gross expenditures and net revenues of plaintiff, in the state of Washington, city of Seattle and city of Tacoma, respectively, were properly computed and fairly allocated to the respective portions of plaintiff's property in said state and

cities, used and useful, in rendering intrastate toll service, intrastate telegraph service, and exchange service therein, the results would show that plaintiff is receiving a fair, just, reasonable and compensatory return on the cost and fair value of its property in said state, devoted to intrastate toll service, and that plaintiff is receiving a fair, just, reasonable and compensatory return on the cost and fair value of its property in the city of Seattle and city of Tacoma, respectively, devoted to exchange service therein. These defendants allege that by reason of the failure of the amended and supplemental complaint to contain any statements as to the matters hereinabove set forth, the said amended and supplemental complaint does not state facts sufficient to entitle the plaintiff to any relief against these defendants or either of them.

[fol. 192] II

That the city of Seattle is now, and at all times herein mentioned has been, a municipal corporation and city of the first class, organized and existing under and by virtue of the laws of the state of Washington, and as such, is now and at all times herein mentioned has been, empowered by law to authorize or prohibit the locating or constructing of telephone lines, facilities or equipment in its streets, alleys and public places, and authorized to grant franchises for the laying down, erection and construction, and maintenance and operation of such telephone lines, facilities and equipment in the public streets within its corporate limits and empowered to prescribe the terms and conditions under and by virtue of which such franchises might issue, and to prescribe therein the terms and conditions under and by virtue of which "telephone companies" might lay down, erect and construct, and maintain and operate, telephone lines, facilities and equipment in the public streets of said city, and authorized to prohibit such laying down, erection, construction, operation and maintenance and to enforce compliance with such franchise terms, provisions and conditions, except as modified by general law.

That the plaintiff, The Pacific Telephone and Telegraph Company, is a corporation organized and existing under and by virtue of the laws of the State of California and [fol. 193] doing business in the state of Washington, and

was and is a "telephone company" within the meaning of the "Public Service Commission Law of Washington."

That Ordinance No. 6498 of the City of Seattle, as amended by Ordinance No. 7143 thereof, is a valid and subsisting ordinance of said city, entitled:

"An ordinance granting to John S. McGroarty and George C. Blankner, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system, to erect and maintain telephone and telegraph poles and to run, suspend, maintain and operate wires for a telephone and telegraph system, for a period of twenty-five (25) years in, over, upon and under the streets, alleys and public highways of the City of Seattle."

passed by the City Council of said city on the 31st day of December 1900, and within five days thereafter presented to the Mayor of said city and by said Mayor, within ten days after receiving the same, returned to the City Council without his approval, together with his objections thereto in writing, which were duly and regularly entered at large on the Journal of the Council, and published in the city official newspaper, and by the City Council, not less than five days after such publication and within thirty days after such bill had been returned by the Mayor reconsidered and voted upon and, upon such reconsideration, again passed by the affirmative vote of not less than two-thirds of all of the members elected to the City Council, and by the President of the [fol. 194] City Council so certified on said bill, said ordinance thereby becoming effective on January 21st, 1901, pursuant to Section 16, Article IV, of the City Charter; that by the terms and provisions of said ordinance, pursuant to lawful authority, there was granted unto the grantees therein named, their successors and assigns, a franchise to lay down, erect and construct, and maintain and operate, telephone lines, conduits, facilities and equipment in all the public streets of such city, for a period of twenty-five (25) years from the effective date of said ordinance; that said franchise was duly accepted by the grantee therein named on the 14th day of February, 1901, (said acceptance being filed as Seattle Comptroller's file No. 167) and the benefits thereof

enjoyed by said grantees, their successors and assigns ever since said date; that pursuant to said franchise, said grantees therein named, and their successors and assigns, have laid down, erected and constructed, and operated and maintained, and now operate and maintain telephone lines, conduits, equipment, facilities and telephone systems within the City of Seattle; that subsequent to the acceptance of said franchise, the grantees thereof, by certain sundry means, conveyances within the knowledge and possession of the plaintiff but not of the defendants, transferred and assigned said franchise and the property held thereunder to the plaintiff, The Pacific Telephone and Telegraph Com-
[fol. 195] pany, which said plaintiff is now the owner and holder thereof and maintains and operates its telephone system within the city of Seattle thereunder and subject thereto and without any other franchise of the city of Seattle whatsoever; that said plaintiff has acquired from time to time other telephone lines, facilities and equipment, which have been so commingled, consolidated and confused with the franchise property as to be incapable of being dis-associated or separated therefrom; that the franchise granted by said Ordinance No. 6498 is the only valid and subsisting Seattle franchise of said plaintiff, and that all of its lawful maintenance and operation in public places and public streets within the city of Seattle is under and subject to said franchise; that Section 7 of said Ordinance No. 6498 is in words and figures as follows, to-wit:

"That the grantees herein, their successors and assigns, shall not, during the continuance of this franchise, charge or receive for rent, or for use of each telephone furnished by the grantees, their successors and assigns, under this franchise any greater rates or sums than the following, to-wit: For a business telephone (one party line) Four Dollars ($4.00) per month; for a business telephone (two party lines) three and 50/100 Dollars ($3.50) per month; for a residence telephone (one party line) two and 50/100 Dollars ($2.50) per month; for a residence telephone (two party line) Two Dollars ($2.00) per month; the foregoing rates shall be the maximum rates to be charged and received for such telephones."

[fol. 196] That subsequent to the granting of said franchise, to-wit: on the 29th day of December, 1911, the Public

Service Commission of Washington, a rate regulating body established by the "Public Service Commission Law of Washington," in its Cause No. 31, entitled, "The Railroad Commission of Washington, ex rel. Seattle Hardware Company, complainant, v. The Pacific Telephone and Telegraph Company, a corporation, Independent Telephone Company, a corporation, The City of Seattle, a municipal corporation, the Seattle Chamber of Commerce, and Seattle Commercial Club, defendants," made and entered an order authorizing the rates prescribed by said Section 7 of said Ordinance No. 6498 to be increased as follows and not to exceed the following amounts: Business telephones (one party), $4.00 to $5.00 per month; business telephones (two party), $3.50 to $4.00 per month; residence telephones (one party), $2.50 to $2.75 per month; and residence telephone (two party), $2.00 to $2.25 per month, and directed that all other charges should remain as fixed by the tariff on file conforming to the rates prescribed in said Section 7, which modification of said rates prescribed in Section 7 became effective as, and when, directed by such order of the Public Service Commission; that on the 5th day of August, 1916, the said Public Service Commission of Washington, in its Cause No. 1825, entitled "The Public Service Commission [fol. 197] of Washington, complainant v. The Pacific Telephone and Telegraph Company, respondent," made and entered an order authorizing the rates prescribed by said Section 7, of said Ordinance No. 6498 to be increased as and when by such order directed, not to exceed certain therein specified amounts, which said increased amounts and rates were on the 1st day of September, 1916, embodied in a tariff filed with the Public Service Commission of Washington, a copy of which said tariff, in so far as the same relates to the City of Seattle and the increased rates authorized in respect to said franchise, is hereunto attached, marked Exhibit "A" and by such reference made a part hereof; that the rates established by said Section 7, as so modified by said orders of the Public Service Commission, have never since been changed or modified, either by contract or by lawful Commission order, or otherwise, and that no lawful order has ever been entered by any rate regulating body directing the termination of the rates specified by said Section 7 or any other modification of the

same, excepting as hereinabove stated; that said rates are still the lawful rates of the plaintiff company within the City of Seattle and the maximum rates which it is authorized by law to charge within the City of Seattle, and that each and all of the lawful rates so prescribed are less than the rates that the plaintiff is now charging under a pre-
[fol. 198] tended tariff on file with the State Department of Public Works and less than the rates of which it makes complaint before this court.

That in addition to the hereinabove quoted Section 7, providing rates on behalf of the public, said ordinance and franchise contained certain other covenants, terms and conditions intended for the benefit of the city of Seattle in its corporate capacity, as distinguished from the interests of the public; that said covenants, terms and conditions constitute a part of the consideration furnished by the franchise holder for the rental and use of the city's streets thereunder; that among the other such covenants, terms and conditions, it is therein provided that the franchise holder shall from time to time place its telephone equipment and system underground within such areas as may be specified by the City Council, and shall in all cases where excavations are made in public streets, restore the same at its own expense to good condition for travel and give bond for such purpose, and shall hold and save the City of Seattle harmless from, and indemnify it against, any and all damages arising out of the negligence of the franchise holder in respect to its equipment and facilities in the city streets, and shall, at its own expense, move and remove its wires, facilities and equipment in the public streets from time to time as such moval and removal may be required by reason of improvement of the city streets or the moving of buildings
[fol. 199] across the same, and shall furnish and maintain certain therein specified free telephones for the use of the city in its corporate capacity and permit the city to maintain all wires which the city may require for fire alarm or police telegraph purposes on all the various poles and in all the various underground conduits maintained by the franchise holder.

That on the 3rd day of May, 1923, after the commencement of the above entitled action, the said plaintiff, The Pacific Telephone and Telegraph Company, with intent to

retain the benefits of the franchise and relieve itself of its contractual obligations with the City of Seattle, and in violation of Section 8, Article XII, of the Constitution of the State of Washington, sought to alienate the franchise above mentioned so as to release the property held thereunder from the liabilities and obligations incurred in respect thereto, by executing a purported assignment of said franchise to one F. H. Crosby, of San Francisco, California, without transferring therewith the franchise property in respect to which the plaintiff was under contractual obligations with the City of Seattle, as hereinabove mentioned; that the plaintiff, by such purported assignment, attempted to separate said franchise from, and itself retain, all of the property, real, personal and mixed, constituting its telephone system, facilities and equipment operated under said [fol. 200] franchise within the City of Seattle; that said assignment was in violation of the State Constitution and has never been consented to by the City of Seattle and was a colorable transfer of said franchise only and made with intent to escape the plaintiff's contractual relationship with the City of Seattle and in defiance of the constitutional provision hereinbefore mentioned; that said F. H. Crosby still purports to retain and hold said franchise, but in fact said F. H. Crosby is an agent of said plaintiff corporation, and still holds the same in trust for the plaintiff, and not otherwise, and that he in fact gave no valuable consideration (not even the $10.00 in the assignment alleged), to the said plaintiff for said assignment, and that said assignment was, and is, colorable only and was made temporarily for the purpose of this suit and for the purpose of apparently divesting title of plaintiff to said franchise, and in violation of the plaintiff's contractual obligations in respect to the franchise property and in violation of the constitutional provision hereinabove mentioned; that said F. H. Crosby is not the owner or holder of any telephonic exchange system or equipment in the city of Seattle and is therefore without the power and equipment to furnish to the city of Seattle the franchise service, facilities, guaranties and protection hereinabove mentioned; that the hereinabove mentioned guaranties and rights of the city of Seattle, being the consideration for the use and occupancy of the city [fol. 201] streets, are attached to, and inherent in, the fran-

chise property which is still retained by the plaintiff, and that therefore said pretended severance and assignment of said franchise are null and void; that copies of said ordinances, Numbers 6498 and 7143 are hereunto attached and marked Exhibits "A-1" and "A-2," respectively, and by such reference made a part hereof.

That the plaintiff's lawful maximum exchange rates in The City of Seattle being specified by franchise contract, there is no confiscation as a matter of law and no constitutional right is invaded in requiring the plaintiff to observe and comply with the same, and that therefore this court is without jurisdiction to inquire into such rates in respect to the city of Seattle.

III

That the city of Tacoma is now and at all times herein mentioned has been a municipal corporation and city of the first class, organized and existing under and by virtue of the laws of the State of Washington, and as such, is now, and at all times herein mentioned has been, empowered by law to authorize or prohibit the locating or constructing of telephone lines facilities or equipment in its streets, alleys and public places, and authorized to grant franchises for the laying down, erection and construction, and maintenance and operation, of such telephone lines, facilities [fol. 202] and equipment in the public streets within its corporate limits and empowered to prescribe the terms and conditions under and by virtue of which such franchises might issue, and to prescribe therein the terms and conditions under and by virtue of which "telephone companies" might lay down, erect and construct, and maintain and operate, telephone lines, facilities and equipment in the public streets of said city, and authorized to prohibit such laying down, erection, construction, operation and maintenance and to enforce compliance with such franchise terms, provisions and conditions, except as modified by general law.

That the plaintiff, The Pacific Telephone and Telegraph Company, is a corporation organized and existing under and by virtue of the laws of the State of California and doing business in the State of Washington, and was, and is, a "telephone company" within the meaning of the "Public Service Commission Law of Washington."

That ordinance No. 2522 of the city of Tacoma is a valid and subsisting ordinance of said city entitled,

"An ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain underground conduits, cables and wires, and to construct necessary manholes, make house connections and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an Automatic telephone system, and telegraph [fol. 203] system and business, in the city of Tacoma,"

passed by the city council of said city on the 6th day of December, 1905, and within five days thereafter presented to the Mayor of said city and by said mayor within ten days after receiving the same returned to the city council without his approval, together with his objections thereto in writing, which were duly and regularly entered at large on the journal of the council, and the council reconsidered and voted upon said ordinance and again passed same by the affirmative vote of not less than two thirds of all the members elected to the city council. Said ordinance was published and became effective on the 15th day of December, 1905. A copy of said ordinance is hereto attached, marked "Exhibit B" and by reference made a part hereof. Said ordinance was accepted in writing by Edward E. Webster, grantee therein, on the 25th day of January, 1906, a copy of said acceptance, being hereto attached, marked "Exhibit B-1" and by reference made a part hereof. By the terms and provisions of said ordinance, pursuant to lawful authority, there was granted unto the grantee therein named, his successors and assigns, for the period of twenty-five years, the right, privilege and franchise to erect poles, with the necessary supports, cross arms and fixtures, and to string wires and cables thereon, and to construct underground conduits, together with the necessary manholes and [fol. 204] other appliances, and to lay, place and stretch wires and cables therein and along, over, upon, under and across the streets, alleys, avenues, and public places of the city of Tacoma, Washington, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip, install, maintain and operate an automatic telephone system and a telegraph system, and to con-

duct a general telephone and telegraph business within said city of Tacoma.

Said franchise was thereafter assigned by said Webster to the Home Telephone Company of Puget Sound, a corporation, and thereafter assigned by said Home Telephone Company of Puget Sound, a corporation, to the Sunset Telephone and Telegraph Company, a corporation, and thereafter, on the 5th day of January, 1916, assigned by said Sunset Telephone and Telegraph Company to The Pacific Telephone and Telegraph Company, the plaintiff above named, a copy of said last named assignment being hereto attached, marked "Exhibit B 2" and by reference made a part hereof. That the said last named assignment was approved by the City of Tacoma by its Ordinance No. 6319 entitled,

"An Ordinance granting the consent of the city of Tacoma to the Sunset Telephone & Telegraph Company, a [fol. 205] corporation, to assign the franchise granted by Ordinance No. 2522 to Edward E. Webster, his successors and assigns, and the property held and used thereunder, to the Pacific Telephone and Telegraph Company,"

passed by the city council on the 9th day of February, 1916, a copy of said ordinance being hereto attached, marked "Exhibit B 3" and by reference made a part hereof.

That section 13 of said Ordinance No. 2522 is in words and figures as follows:

"That the rent or charge for all unlimited, independent, metallic circuit telephone service in the system established or maintained under said franchise, so long as such system does not connect an exchange with more than four thousand (4,000) telephones, shall not exceed four and twenty-five one hundredths dollars ($4.25) per month for a telephone installed in any business office or premises for business purposes, or two and twenty-five one hundredths dollars ($2.25) per month for a telephone installed in a private residence; and that when said system shall comprise more than four thousand (4,000) and less than five thousand (5,000) telephones the rent or charge shall not exceed four and seventy-five one hundredths ($4.75) dollars per month for a telephone installed in any business office, or premises

for business purposes, or two and fifty one hundredths dollars ($2.50) per month for a telephone installed in a private residence; and that when said system shall comprise more than five thousand (5,000) and less than six thousand (6,000) telephones, the rent or charge shall not exceed five and twenty five one hundredths dollars ($5.25) per month for a telephone installed in any business office or premises for business purposes, or two and seventy five one hundredths [fol. 206] dollars ($2.75) per month for a telephone installed in a private residence; and that when said system shall comprise more than six thousand (6,000) and less than eight thousand (8,000) telephones, the rent or charge shall not exceed five and seventy five one hundredths dollars ($5.75) per month for a telephone installed in any business office or premises for business purposes, or two and seventy five one hundredths dollars ($2.75) per month for a telephone installed in a private residence; Provided, however, That if said system should exceed eight thousand (8,000) telephones, no greater rent or charge shall be made than six and twenty five one hundredths dollars ($6.25) per month for a telephone installed in any business office or premises for business purposes, or three and twenty-five one hundredths dollars ($3.25) per month for a telephone installed in a private residence; Provided, further, That a discount of twenty five (25) cents per month shall be allowed if payment shall be made in advance at the office of the company before the tenth (10th) day of the month in which the service is rendered. No charge shall be made for installing telephones nor for removing same at expiration of contract therefor."

That said Ordinance No. 2522 is still in full force and effect, and it has been adjudicated by the Supreme court of the State of Washington that such franchise ordinances constitute valid and binding contracts between public utilities and a city and its inhabitants, save as and when they may be modified by the Public Service Commission of the State of Washington, or its successor, the Department of Public Works of said state, and that said franchise contract between the plaintiff and the city of [fol. 207] Tacoma and its inhabitants has never been terminated or modified by the Public Service Commission

of the State of Washington, or the Department of Public Works of said state, save by the order of said department of August 8, 1919, permitting the putting into effect of the rates prescribed in exhibit "A" attached to the amended and supplemental complaint herein, which rates increased the charge for business telephones in the city of Tacoma to an amount in excess of the maximum prescribed by said franchise contract. That the plaintiff's lawful maximum exchange rates in the city of Tacoma, being specified by franchise contract, there is no confiscation as a matter of law in the rates continued in effect by the said order of the said department, and no constitutional right is invaded in requiring the plaintiff to observe and comply with the rates fixed by said franchise contract, as and when modified by the said order of the said department, and therefore this court is without jurisdiction to inquire into such rates in respect to the city of Tacoma.

Wherefore, these defendants, having fully answered all the matters in the amended and supplemental complaint herein material to be answered according to their best knowledge and belief, humbly pray this honorable court that the said defendants be hence dismissed with their reasonable costs and charges, and said defendants humbly [fol. 208] pray for such other relief in the premises as to this honorable court may seem meet and in accordance with equity.

Department of Public Works of Washington, by Walter B. Whitcomb, Director. Frank R. Spinning, Supervisor of Transportation. John H. Dunbar, Attorney General. Attest: Sam L. Crawford, Secretary. John H. Dunbar, Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Defendants. Thomas J. L. Kennedy, E. K. Murray, of Counsel. (Seal.)

[fol. 209] EXHIBIT "A"

W. P. S. C. No. 2, Section 1

The Pacific Telephone & Telegraph Company Exchange Rate Schedule

Exchange—Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.50
Auxiliary Line	6.00	6.00
Auxiliary Line (Inward Service)	3.00	3.00
Suburban Service (ten party line see Sec. 2)	3.00	3.00
Extension (with or without bell)	1.00	1.00

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.00	$3.50
Two party Line	2.50	3.00
*Four party Line	2.25	2.75
Extension (without bell)	.50	.50
Extension (with bell)	.50	.50
Suburban service (ten party line, see Sec. 2)	2.50	2.50

Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Area, see Mileage Rates, sec. 3.

month.

Issued September 1, 1916. Effective September 1, 1916.

Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

P. H. Coolidge, General Commercial Superintendent

[fol. 210] W. P. S. C. No. 2, Section 1

The Pacific Telephone & Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.00	$5.00	$1.00	$.03
Individual Line	6.00	6.00	1.50	.025
Auxiliary Line	2.50	2.50	.....	.....
Extension (with or without bell)	.75	.75	.....	.....

*Discount of 25 cents if bill is paid at office on or before the tenth day of month.

*In accordance with Order No. 1825 of the Public Service Commission of Washington.

Residence—Measured Service: ——

Business—Coin Box Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$ .15	$ .15	$ .03	$ .035
Extension (with or without bell)	1.00	1.00	....	....

Residence—Coin Box Service ——

Issued September 1, 1916. Effective September 1, 1916
Cancels and supersedes Exchange Rate Schedule effective January 1, 1911

F. H. Coolidge, General Commercial Superintendent

[fol. 211] EXHIBIT A-1

Ordinance No. 6498

An ordinance granting to John S. McGroarty and George C. Blanker, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system, to erect and maintain telephone and telegraph poles and to run, suspend, maintain and operate wires for a telephone and telegraph system, for a period of twenty-five (25) years, in, over, upon and under the streets, alleys and public highways of the City of Seattle.

Be it ordained by the City of Seattle as follows:

Section 1. That there is hereby granted, upon the considerations and conditions in this ordinance contained, to John S. McGroarty and George C. Blanker, their successors and assigns, for a period of twenty-five (25) years, from and after the passage and approval of this ordinance, the right and privilege to lay down, construct, erect, maintain and operate in, over, upon and under the streets, alleys and public highways of the City of Seattle, underground pipes or conduits with the necessary manholes and other appliances therefor, and telephone and telegraph poles,

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*In accordance with Order No. 1825 of the Public Service Commission of Washington.

and to run, suspend, maintain and operate in and through said underground pipes or conduits, and upon said poles the wires and other conductors and the apparatus necessary and proper to be used in carrying on and operating a telephone and telegraph system and business: Provided, that in any district in said city which the City Council shall be ordinance have heretofore designated, or shall heretofore designate, as a district in which telephone or telegraph wires and conductors shall be laid underground, the said grantees, their successors and assigns shall not be permitted to erect main line poles and [fol. 212] run or suspend wires or other conductors thereon, but shall lay such wires or conductors in underground pipes or conduits; and if, prior to the passage of any such ordinance designating any district in said city, said grantees, their successors or assigns, shall have erected poles in such district and run and suspended wires and other conductors thereon, the said grantees, their successors and assigns shall, upon the passage of such ordinance and within such period of time thereafter as may be reasonable, remove its main line poles and other conductors run and suspended thereon from the streets, alleys and public highways embraced in such district so designated by the City Council; and whenever the said grantees, their successors and assigns shall construct and lay down underground pipes or conduits in any portion of any street, alley or public highway in said city and shall lay and run its wires or other conductors therein, and they shall forthwith remove from such portion of such street, alley or public highway any and all main line poles, and the wires and other conductors run and suspended therefrom and thereon, which they had theretofore erected, run or suspended, in such portion of such street, alley or public highway and shall not thereafter erect or maintain any poles whatever therein: And provided further, that in the following described district of the City of Seattle, to-wit:

Commencing at the intersection of the easterly line of Third Avenue and the southerly line of Yesler Way; thence northerly along the easterly line of Third Avenue to the northerly line of Pike Street; thence westerly along the northern line of Pike Street to the westerly line of First Avenue; thence southerly along the westerly line of First

Avenue to the northerly line of University Street; thence westerly along the northerly line of University Street to [fol. 213] the westerly line of Post Street; thence southerly along the westerly line of Post Street to the southerly line of Yesler Way; thence easterly along the southerly line of Yesler Way to the place of beginning, all main line wires and other conductors run, maintained and operated by the grantees, their successors and assigns, shall be laid in underground pipes or conduits, and no main line poles shall be erected or overhead main line wires stretched in said district.

Sec. 2. That said grantees, their successors and assigns shall construct said underground system and shall likewise erect and maintain their poles upon, and run, suspend and maintain their wires, over and upon said streets, alleys and public highways of said city under the supervision of the Board of Public Works, all necessary connections to subscribers station, and to other points, to be made from such wires and conductors and with such means, apparatus or appliances as may be requisite. Whenever there shall be tendered to the grantees herein, their successors and assigns contracts for not less than ten (10) telephones for one year to be placed and used within a district whose radius is not more than one-quarter of a mile, the said grantees, their successors and assigns, shall extend its lines to such district and furnish such telephones and service therefor to the person tendering such contract at the rates herein provided and under the same terms and conditions contained in contracts usually made between the grantees, their successors and assigns, and their subscribers unless otherwise provided by express contract between the parties, but the grantees herein, their successors or assigns, shall furnish to any party in the City of Seattle a telephone at the regular rental where the distance necessary to reach same shall not exceed three miles from Pioneer Place.

[fol. 214] Sec. 3. The said grantees, their successors and assigns, upon receiving a permit so to do from the Board of Public Works of the City of Seattle, may make all necessary excavations in any of said streets, alleys or public highways for the purpose of erecting and maintaining poles and other supports for its wires or conductors and

for repairing the same, and for the purpose of laying, repairing and maintaining said underground pipes or conduits, and for placing, repairing, maintaining and operating their wires and other conductors therein. All poles created and maintained pursuant to the terms of this ordinance shall be erected in a good and substantial manner and placed immediately behind the curb, unless otherwise directed by the Board of Public Works, and shall be painted white with black base. The location of all underground pipes or conduits, laid and maintained pursuant to the terms of this ordinance in any street, alley or public highway, shall be such as the Board of Public Works directs. The Board of Public Works shall have the right to cause the said grantees, their successors and assigns, to change the location of any pole whenever the public convenience shall require such change, the expense of such change of location to be paid by said grantees, their successors or assigns. Whenever any excavations shall have been made pursuant to the authority herein granted, the said grantees, their successors and assigns, shall, as soon as possible, restore the portion of the street, alley, or public highway excavated to the same good order and condition in which it was prior to such excavation or work, and all said work shall be done in compliance with the necessary rules, regulations, ordinances or orders which may during the continuance of this franchise be in force or be adopted from time to time by the City of Seattle, or by the Board of [fol. 215] Public Works thereof, and said work of restoring said streets, alleys and public highways shall be done to the satisfaction of said Board of Public Works.

Sec. 4. Before said grantees, their successors or assigns, shall commence the installation of their system within the City of Seattle they shall file with the City Comptroller a bond in the sum of $10,000, with surety company, approved as provided by the City Charter, conditioned that each and every street, alley or other public highway in said City of Seattle that may be disturbed or torn up under the provisions of this ordinance, shall be replaced and put in as good order and condition as same were in before being interfered with by said grantees, their successors and assigns, and further conditioned that grantees, their successors and as-

signs, will faithfully keep and perform each and every term and condition imposed on it by this ordinance.

Sec. 5. That said grantees, their successors or assigns, hereby agree and covenant to indemnity the said City of Seattle, for any and all injury arising from any accident to persons or property by reason of any neglect or omission to keep said poles and excavations and wires in a safe condition, and for all valid claims against said City of Seattle for damages caused by said poles, wires or excavations.

Sec. 6. That nothing in this ordinance shall be construed as in any wise preventing the proper authorities of said City from sewering, grading, paving, planking, repairing, altering or in any other manner improving any of the streets, alleys, or public highways of said city, or any portion thereof, but all such work shall be done, as far as it may be possible so to do, without increasing the cost thereof to [fol. 216] the city, in such a manner as to not obstruct, injure or prevent the free use and operation of said telephone and telegraph system of said grantees, their successors and assigns.

Sec. 7. That the grantees herein, their successors and assigns, shall not, during the continuance of this franchise, charge or receive for rent, or for the use of each telephone furnished by the grantees, their successors and assigns, under this franchise, any greater rates or sums than the following, to-wit: For a business telephone (one party line) Four Dollars ($4.00) per month; for a business telephone (two party line) three and 50-100 dollars ($3.50) per month; for a residence telephone (one party line) two and 50-100 dollars ($2.50) per month; for a residence telephone (two party line) two dollars ($2.00) per month; the foregoing rates shall be the maximum rates to be charged and received for such telephones.

Sec. 8. That the rights and privileges granted by this ordinance are granted upon the conditions herein contained and upon the following considerations, to-wit: That during the entire continuance and existence of this franchise the said grantees, their successors and assigns, shall furnish and maintain for said city, free of charge, twenty five tele-

phones for the city government of the said City of Seattle, the same to be placed under direction of the Board of Public Works, and in addition thereto one telephone in each of the engine houses of the fire department of the said City of Seattle; and said city shall have the right to suspend upon the top of the poles placed by said grantees, their successors and assigns, in the streets, alleys, and public highways of said city any and all wires which the city may require for fire alarm and police telegraph purposes, and to run wires through its underground conduits [fol. 217] sufficient for the city fire alarm and police telegraph circuit, all of which privileges shall be free of charge to said city; provided, that no use of such poles by the said city shall be such as to in any manner interfere with or hinder the said grantees, their successors and assigns, in the use of said poles or conduits, the operation of its system, or the conduct of their business.

Sec. 9. That whenever any person or persons, company or corporation, shall have obtained permission of the Board of Public Works to remove any building, structure or edifice through any street or streets of said City of Seattle through which the lines or wires of the said grantees herein, their successors and assigns, shall in any way interfere, the said grantees, their successors and assigns, shall, upon forty-eight (48) hours' notice from the Board of Public Works, raise or remove said lines or wires so as to allow free and unobstructed passage of any such building, structure or edifice; and if the said grantees, their successors and assigns, shall neglect or refuse, upon such notice, to remove such line or lines, said line or lines shall be removed or raised by the Board of Public Works at the expense of said company, its successors and assigns, so as to admit of the free passage of such building, structure or edifice.

Sec. 10. That whenever it shall be necessary in grading any street or alley in said city, or in building any sidewalks, or making any improvements thereon or therein, to remove any pole or poles, belonging to said grantees, or on which any line or lines, wire or wires, belonging to said grantees, shall be stretched or fastened, the said

grantees, their successors and assigns, shall upon receiving forty-eight (48) hours' notice from the Board of Public Works remove such pole or poles; and if said grantees, {fol. 218} their successors and assigns, upon such notice shall neglect or refuse to remove such pole or poles, then such pole or poles shall be removed by the Board of Public Works at the expense of said grantees, their successors and assigns. Whenever it shall be necessary, in making any of the improvements mentioned in this section, to remove, relocate, or in any manner change any underground pipe or conduit belonging to said grantees, their successors or assigns, or in or through which any line or lines, wire or wires, belonging to the said grantees, their successors and assigns, shall be placed or laid, the said grantees, their successors and assigns, shall, within a reasonable time after receiving notice from the Board of Public Works of said city so to do, remove, relocate or change such pipe or conduit; and if said grantees, their successors or assigns, shall upon such notice neglect or refuse to remove, relocate or change such pipe or conduits within such reasonable time, then such pipe or conduit shall be removed, relocated or changed by the Board of Public Works at the expense of said grantees, their successors and assigns.

Sec. 11. The grantees, their successors or assigns, shall deposit with the City Comptroller, within five days after the passage and approval by the mayor of this ordinance, the sum of thirty-five hundred dollars ($3,500) in gold coin of the United States, or a certificate of deposit for said sum payable to the order of the City Comptroller, which sum shall be retained by and forfeited to the City of Seattle and paid into the general fund of said city in case the grantees, their successors or assigns, shall fail to file the bond as required by this ordinance and shall fail to file their written acceptance of this franchise with the City Comptroller within thirty days after its passage and approval and shall fail to commence the work of construction {fol. 219} on its telephone and telegraph system within sixty days after the date of their acceptance, and shall fail to have in operation at least three hundred telephones within one year from the date of the taking effect of this ordinance. A failure upon the part of the grantees herein,

their successors or assigns, to perform any of the conditions in this section provided, shall render this ordinance wholly inoperative and void; but in case the grantees, their successors or assigns, shall comply with the provisions of this section, then and in that event the City Comptroller shall return to the grantees, their successors or assigns the said $3,500.00 or the said certificate of deposit upon the demand of said grantees, their successors or assigns.

Within thirty days after the passage and approval of this ordinance, the said grantees, shall file with the City Comptroller of the City of Seattle, their written acceptance of all of the terms and conditions of this franchise and the rights granted hereby and unless such acceptance shall be so filed, the grant herein made shall not take effect and this ordinance shall be wholly inoperative and void.

Sec. 12. The rights, privileges and franchises herein granted shall continue to be in force for a period of twenty-five years from and after the date of its passage. If said poles, wires and conduits, or any thereof, erected by said grantees, their successors or assigns, be not removed within a period of three months from and after the expiration of said twenty-five years, they shall become in that event the property of the City of Seattle.

Sec. 13. That no assignment or transfer of this franchise or any right or privilege hereby granted shall be made by said grantees, except that they may within a [fol. 220] period of thirty days from the date of their acceptance hereof transfer the same to a corporation to be organized for the purpose of building the system as herein provided.

Sec. 14. That the City of Seattle reserves the right to at any time repeal, change or modify this ordinance if the franchise hereby granted is not operated in accordance with the provisions herein contained, or at all, and the City of Seattle also reserves the right to at any time hereafter repeal, change or modify the grant herein made having proper regard for the rights of the grantees, their successors or assigns.

Sec. 15. This ordinance shall take effect and be in force from and after its passage and approval, if approved

by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the City Charter.

Passed the City Council the 31st day of December, 1900, and signed by me in open session in authentication of its passage this 31st day of December, 1900.

W. V. Rinehart, President of the City Council.

Approved by me this — day of ——, 1901.

—— ——, Mayor.

I, W. V. Rinehart, President of the City Council, hereby certify that the foregoing bill, having been returned to the City Council by the Mayor without his approval, together with his objections thereto in writing, and said objections having been entered at large in the Journal of the City Council and published in the city official newspaper, the City Council did, on the 21st day of January, 1901, being more than five days after such publication and within thirty days after being so returned, reconsider and vote upon said bill, and said bill was upon such reconsideration [fol. 221] again passed by the City Council by the affirmative vote of nine (9) members, said affirmative vote being two-thirds of all the members elected to and composing said City Council.

This certificate made and signed by me this 23rd day of January, 1901.

W. V. Rinehart, President of the City Council.

Filed by me this 23rd day of January, 1901.

Attest:

Frank H. Paul, City Comptroller and ex Officio City Clerk, by G. K. Coryell, Deputy Clerk.

Published January 24, 1901.

Frank H. Paul, City Comptroller and ex Officio City Clerk, by G. K. Coryell, Deputy Clerk.

STATE OF WASHINGTON,
County of King,
City of Seattle, ss:

I, H. W. Carroll, City Comptroller and ex-officio City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of Ordinance No. 6498 of the City of Seattle, as the same appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the seal of the City of Seattle this 14th day of February, 1925.

H. W. Carroll, City Comptroller and ex-Officio City Clerk of the City of Seattle, by (Sd.) E. N. Street, Deputy. (Corporate Seal.)

[fol. 222] EXHIBIT A-2

Ordinance No. 7143

An ordinance amending Section 13 of an ordinance of the City of Seattle, numbered 6498, entitled "An Ordinance granting to John S. McGroarty and George C. Blankner, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system; to erect and maintain telephone and telegraph poles and to run, suspend, maintain and operate wires for a telephone and a telegraph system for a period of twenty-five years, in, over, upon and under the streets, alleys and public highways of the City of Seattle," so as to authorize the sale, mortgaging and incumbering by said grantees, their successors and assigns, the franchise granted, and amending said ordinance by adding thereto a new section, numbered 13½, authorizing said John S. McGroarty and George C. Blankner, their successors and assigns, to acquire by purchase or otherwise any completed or partially constructed telephone and telegraph plants, and poles, wires, 'phones and other appliances erected and placed under any other

franchise, and providing that the same shall be deemed and accepted as constructed and acquired under and in compliance with the requirements of said Ordinance numbered 6498.

Whereas, the City of Seattle duly enacted Ordinance No. 6498 entitled "An Ordinance granting to John S. McGroarty and George C. Blankner, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system; to erect and maintain telephone and telegraph poles, and to run, suspend, maintain and operate wires for a telephone and telegraph system for a period of twenty-five [fol. 223] years in, over and upon and under the streets, alleys and public highways of the City of Seattle," which said ordinance was duly published, and,

Whereas, within the time prescribed by said ordinance the said John S. McGroarty and George C. Blankner filed with the City Comptroller of the City of Seattle their written acceptance of all the terms and conditions of the said franchise, and,

Whereas, within the time prescribed by said ordinance the said John S. McGroarty and George C. Blankner did by an instrument in writing assign said franchise and all of the rights in and to the same, to the Independent Telephone Company, a corporation created and existing under the laws of the State of Washington, organized for the purpose of building the system provided for in said Ordinance, and

Whereas, the said John S. McGroarty, the said George C. Blankner and the said Independent Telephone Company have in all respects complied with the provisions of said Ordinance, and the franchise granted by said Ordinance is now a valid and existing franchise, and the Independent Telephone Company is the owner of the same and of all the rights and privileges granted by said ordinance, and,

Whereas, it may become necessary or expedient for the Independent Telephone Company to mortgage and incumber its property and the franchise granted by the City of Seattle by said Ordinance numbered 6498 in order to more

full attain the objects of its incorporation and of said Ordinance, and,

Whereas, the Seattle Automatic Telephone Exchange Company is the owner of a nearly completed telephone and telegraph plant, with a large number of poles, wires 'phones [fol. 224] and other appliances such as are generally used in the construction, maintenance and operation of a telephone and telegraph plant, which property and plant said Seattle Automatic Telephone Exchange Company acquired and constructed under the provisions of an ordinance of the City of Seattle numbered 5551, entitled "An Ordinance granting to the Seattle Automatic Telephone Exchange Company, its successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system, and erect and maintain telephone and telegraph poles, and to run, suspend, maintain and operate wires for a telephone and telegraph system, for a period of twenty-five years in, over, upon and along the streets, alleys and public highways of the City of Seattle," and ordinance numbered 6171 amending same, and,

Whereas, the Independent Telephone Company desires to acquire said plant and property of said Seattle Automatic Telephone Exchange Company if the said plant and property, and the work of construction therewith heretofore performed by the Seattle Automatic Telephone Exchange Company will be accepted by the City of Seattle as property acquired and work done by the Independent Telephone Company under and in compliance with the provisions of said Ordinance numbered 6498,

Now, therefore,

Be it ordained by the City of Seattle as follows:

Section 1. That section 13 of said ordinance numbered 6498 be and the same is hereby amended so as to read as follows:

"Section 13. This franchise and the rights herein granted may be sold, assigned and mortgaged, but no such sale, [fol. 225] assignment or mortgage shall be valid until a copy of the instrument constituting such sale, assignment or mortgage has been filed in the office of the City Clerk."

Sec. 2. That to said Ordinance there be added a new section numbered 13½, which shall read as follows:

"Section 13½. The assignee of this franchise is hereby authorized and empowered, in lieu of actual construction by it under this ordinance to acquire by purchase or otherwise, any existing completed or partially constructed telegraph or telephone plant and line or lines in the City of Seattle, and to bring the same under the operation of this franchise, and the acquisition and bringing of the same under the operation of the franchise shall be equivalent to construction, completion and operation under this franchise to the extent that such plant, line or lines conform to the requirements of this ordinance; except that the $3,500.00 deposited by the assignee of this franchise shall be subject to forfeiture by the City of Seattle."

Sec. 3. This ordinance shall take effect and be in force from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the City Charter.

Passed the City Council the 5th day of August, 1901, and signed by me in open session in authentication of its passage this 5th day of August, 1901.

J. E. Crichton, President of the City Council.

Approved by me this 8th day of August, 1901.

T. J. Humes, Mayor.

Filed by me this 8th day of August, 1901.

Attest:

Frank H. Paul, City Comptroller and ex Officio City Clerk, by ——— ———. (Corporate Seal.)

Published 10th August, 1901.

[fol. 226] State of Washington,
County of King,
City of Seattle, ss:

I, H. W. Carroll, City Comptroller and ex-officio City Clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of Ordi-

nance No. 7143 of the City of Seattle, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of the City of Seattle this 14th day of February, 1925.

H. W. Carroll, City Comptroller and ex-Officio City Clerk of the City of Seattle, by (Sd.) E. N. Street, Deputy. (Corporate Seal.)

[fol. 227] EXHIBIT B

Ordinance No. 2522

By Lamborn:

An ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain underground conduits, cables and wires, and to construct necessary manholes, make house connections and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an Automatic telephone system, and telegraph system and business, in the City of Tacoma

Be it ordained by the City of Tacoma:

Section 1. That Edward E. Webster, his successors and assigns be and is hereby granted for a period of twenty-five years the right, privilege and franchise to erect poles, with the necessary supports, cross arms and fixtures, and to string wires and cables thereon, and to construct underground conduits, together with the necessary manholes and other appliances, and to lay, place and stretch wires and cables therein and along, over, upon, under and across the streets, alleys, avenues and public places of the City of Tacoma, Washington, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip, install, maintain and operate an automatic telephone system and a telegraph business within said City of Tacoma.

Sec. 2. Nothing in this ordinance shall be considered as granted to said Edward E. Webster, his successors or

assigns, an exclusive right, or preventing the granting of similar privileges to other companies or individuals for like purposes.

Sec. 3. That all conduits when practicable shall be laid in alleys, and shall be placed not less than two feet below [fol. 228] the established grade of the street or alley in which such conduits are constructed. The conduits shall be located in conformity with such reasonable regulations as the City Council may by ordinance prescribe for all conduits of similar character. All excavations for constructing, repairing and changing, such conduits shall be done in compliance with the ordinances of said City which may be in force at the time of the performance of the work, and in such manner as not to unnecessarily interfere with the free use of the streets and alleys by the public, save and except such temporary interference as may be necessarily incident to the prosecution of the work.

Sec. 4. That traps and manholes may be constructed along the line of said conduits, provided that said traps and manholes shall be constructed in conformity with plans and specifications approved by the commissioner of Public Works of said City, and so as not in any way to interfere with the use of such streets for travel and traffic.

Sec. 5. That all poles erected under this ordinance shall as far as practicable be set in alleys, and when erected in any street having sidewalk, shall be placed inside of and adjoining the curb. All poles shall not be less than thirty feet long and eighteen inches in circumference at the top, they shall be erected in strict accordance with the provisions of this ordinance and in the most approved manner, they shall be properly shaved, painted and stenciled; provided, however, that the grantee herein, his successors and assigns, shall not erect or place any poles, except in the alleys, between "A" and "K" streets and from Prospect street to South 27th street; except along the water front where it is impracticable to place conduits; nor on Puyallup avenue [fol. 229] from Pacific avenue to East "L" street; nor on Sixth avenue from "K" street to Pine street, except such distributing poles, in said district, as may be necessary; said City shall have the right at any time to require the re-

moval of any and all poles erected in the main streets under this franchise which are within the fire limits of said City as the same now or may hereafter exist, and cause all wires thereon within said limits to be placed underground or in alleys, provided such right shall not be exercised except by ordinance applicable alike to all wires within said limits, owned or held by any and all persons, companies and corporation, doing a telephone or telegraph business in said City.

Sec. 6. Before said grantee his successors and assigns shall begin the construction of conduits along and underneath said streets and alleys, they shall file with the commissioner of Public Works of the City of Tacoma, detailed plans, specifications and profiles of said conduits intended to be laid down along and underneath the said streets and alleys, which said plans, specifications and profiles shall show the side of the street or alley and the distance from the curb that the said conduits are intended to be laid, the size of the said conduits and the location of the manholes leading to said conduits and the depths of said conduits from the surface of the street; and the said grantee, his successors or assigns, shall amend the said specifications, plans and profiles so filed with the commissioner of Public Works of the City of Tacoma, in accordance with the suggestions of the commissioner of Public Works or the City Council, and the construction of said conduits shall not be begun and the soil or the pavement of any street or alley shall not be disturbed in any manner whatsoever for the purpose of constructing and putting in said conduits until the com- [fol. 230] missioner of Public Works, or the City Council of the City of Tacoma, by resolution duly passed, shall have first approved said plans, specifications and profiles aforesaid.

Sec. 7. That in the event that a change of grade, the laying of a sewer or the making of any public improvement, in any of the streets or alleys along and under which the said conduits may be placed, shall render necessary any changes in the position of said conduits, the grantee herein, or his successors or assigns shall move the same at his own cost and expense in conformity with such necessity; and in case the grantee, his successors or assigns, shall fail to com-

ply with the provisions of this ordinance in this regard within a reasonable time after notice in writing by the proper officer of the City so to do, duly given to him, his successors or assigns, or to the manager or agent in Tacoma of said grantee, his successors or assigns, the said City may do the work required and render an itemized account of the cost thereof, which said grantee, his successors and assigns, by the acceptance of this franchise agrees to pay.

Section 8. That said grantee, his successors, or assigns, during the construction, maintenance or repairs of said conduits, poles or wires, or any operation of them, shall save the City of Tacoma absolutely harmless and free from all and any cost and expense of any kind whatsoever occasioned by such work; and that if suit or suits in equity or law shall be instituted against the City of Tacoma because of any damage alleged to have been caused to any person or property because of the construction, maintenance or repairs of said conduits, poles or wires, said grantee, his successors or assigns, shall upon notice in writing from the said City of Tacoma, by its Mayor or City Attor- [fol. 231] ney, defend said suit or suits at its own cost and expense, and in case final judgment shall be rendered in any suit or suits against the City of Tacoma, said grantee, his successors or assigns, hereby covenant and agree forthwith to pay said judgment or judgments and save the City of Tacoma harmless and free from the same and all expense connected therewith.

That said grantee, his successors or assigns, shall furnish to said City an indemnity bond in the sum of ten thousand dollars conditioned to hold the City harmless from all damages and judgments as aforesaid, that may be caused to any person or property during the first year of the life of this franchise.

Sec. 9. That whenever any person has obtained permission to use any of the streets of the City for the purpose of removing any building, the said grantee his successors or assigns, upon forty-eight hours' notice in writing from the commissioner of Public Works shall cut, raise, or remove any of the wires which may obstruct the removal of such building so as to allow the free removal and passage of the same, and in case said grantee, his successors or as-

signs, fail or refuse after such notice to comply therewith, the commissioner of Public Works of said City shall cut, raise, or remove said wires at the expense of said grantee, his successors or assigns, for the purpose aforesaid.

Sec. 10. That said City of Tacoma shall have the right at any time during the life of this franchise, to purchase at a reasonable price, the property of the grantee, his successors or assigns, obtained, constructed and maintained under the provisions of this ordinance, but in making such purchase and the payment of price therefor, the outstanding legal obligations against the owner or owners of this [fol. 232] franchise shall be deducted from the ascertained purchase price, and be assumed and paid by the said City. Provided, however, that in fixing the price to be paid by said City of Tacoma for said property, no value whatsoever shall be included for this franchise.

Sec. 11. That the said grantee, his successors and assigns, shall within thirty days from the date of the commencement of the operation of said telephone system, furnish to the City of Tacoma on demand the telephones necessary for the transaction of City Business, not to exceed sixty telephones and fifteen desk extension telephones connected and operated with said system, and shall thereafter maintain and keep the same in repair, without expense or charge to said City. Said grantee, his successors and assigns, shall if required by said City for municipal purposes, furnish space in his conduits for twenty-five pairs of wires and space on his poles equal to one gain, to be installed by said City and to be used for fire and police alarm purposes; provided, however, that said City, in its use of such space comply with the reasonable plans and rules of said grantee, his successors and assigns, and in no case shall the wires of said City so installed carry an electric current greater than, nor dangerous to the proper operation of the wires of said grantee, his successors and assigns.

Sec. 12. That the work of constructing said system shall be commenced in good faith within four months from the date of the acceptance of this franchise, and shall be continuously prosecuted thereafter in good faith and such system shall be completed within two years thereafter, with an ultimate capacity and extent to

accommodate at least six thousand subscribers, and if said work be not so commenced, prosecuted and completed and in continuous operation within the time and manner herein [fol. 233] specified, and if the grantee shall expend in the construction of said telephone system, less than fifty thousand dollars during the first six months after commencing the work of construction under this franchise, and less than an additional one hundred thousand dollars in the construction of said system within one year thereafter, then this franchise shall be subject to forfeiture.

Sec. 13. That the rent or charge for all unlimited independent, metallic circuit telephone service in the system established or maintained under said franchise, so long as such system does not connect an exchange with more than four thousand (4,000) telephones, shall not exceed four and twenty-five one hundredths dollars ($4.25) per month for a telephone installed in any business office or premises for business purposes, or two and twenty-five one hundredths dollars ($2.25) per month for a telephone installed in a private residence; and that when said system shall comprise more than four thousand (4,000) and less than five thousand (5,000) telephones the rent or charge shall not exceed four and seventy-five one hundredths ($4.75) dollars per month for a telephone installed in any business office, or premises for business purposes, or two and fifty one hundredths dollars ($2.50) per month for a telephone installed in a private residence; and that when said system shall comprise more than five thousand (5,000) and less than six thousand (6,000) telephones, the rent or charge shall not exceed five and twenty five one hundredths dollars ($5.25) per month for a telephone installed in any business office or premises for business purposes, or two and seventy-five one hundredths dollars ($2.75) per month for a telephone installed in a private residence; and that when said system shall comprise more than six thousand (6,000) and less than eight thousand (8,000) telephones, the rent [fol. 234] or charge shall not exceed five and seventy-five one hundredths dollars ($5.75) per month for a telephone installed in any business office or premises for business purposes, or two and seventy-five one hundredths dollars ($2.75) per month for a telephone installed in a private

residence; Provided, however, that if said system should exceed eight thousand (8,000) telephones, no greater rent or charge shall be made than six and twenty-five one hundredths dollars ($6.25) per month for a telephone installed in any business office, or premises for business purposes, or three and twenty-five one hundredths dollars ($3.25) per month for a telephone installed in a private residence; provided, further, that a discount of twenty-five (25) cents per month shall be allowed if payment shall be made in advance at the office of the company before the tenth (10th) day of the month in which the service is rendered. No charge shall be made for installing telephone nor for removing same at expiration of contract therefor.

Sec. 14. That except as hereinafter provided, said grantee, his successors and assigns, shall not without consent of the City evidenced by ordinance passed by two-thirds vote of all the members of the City Council, sell or transfer the conduits, poles, wires, or appliances of any kind or description or sell, lease, transfer or assign any of the rights or privileges herein authorized or granted, to any person, company, trust or corporation now or hereafter engaged in the telephone or conduit business in said City of Tacoma; and shall not at any time enter into any combination directly or indirectly with any person or persons or any corporation concerning the rate to be charged for telephone service; and no officers, directors, employees or managers of the conduit or telephone system authorized [fol. 235] under this franchise shall at any time be in charge of, or officers, directors, employees or managers of any other conduit or telephone system constructed or being operated in said City; provided, however, that said grantee may assign this franchise to a corporation organized by him under the laws of the State of Washington, or some other state of the United States for the purpose of carrying on a general telephone and telegraph business.

Sec. 15. That the person, co-partnership, company or corporation who shall own and operate under this franchise shall, during the life of this franchise, pay to the City of Tacoma, in lawful money of the United States, the sum of one per cent of the gross annual receipts of such grantee, his successors and assigns, from the telephone rentals

within said City for each and every year, and the City reserves the right to increase the amount of said license fee to 2% at any time after the first five years during the life of this franchise; provided that no increase in the rate of said tax shall be made until all other telephone companies doing business in said City shall be required to pay an equal rate of taxation. Said grantee, his successors and assigns, shall on or before the second Monday in January in each year furnish to the City Comptroller of said City a sworn statement of such gross receipts, for the previous year's business, and shall on or before the 15th day of such January in each year, for the first five years of the life of this franchise, pay the amount of one per cent thereof to the City Treasurer, and after the expiration of said five years shall pay such sum as the City Council may require, not exceeding two per cent of such gross receipts. The City Comptroller or such other person or persons as the City Council of said City shall by resolution appoint for that purpose, shall, if said statement is not satisfactory to [fol. 236] said City, have the right to inspect the books of grantee, his successors and assigns, and this franchise may be forfeited by failure to make the payments herein provided for, or by refusal to allow the inspection within ten days after demand therefor duly made.

Sec. 16. As a partial consideration of the granting of this franchise, said grantee, his successors and assigns, shall, all conditions being equal, purchase his supplies, goods, wares, merchandise and material for the erection, construction and maintenance of said telephone system, of Tacoma manufacturers and merchants.

Sec. 17. That said grantee shall file an absolute and unconditional acceptance of this franchise in writing with the City Clerk of the City of Tacoma, within sixty (60) days after the publication of this ordinance, and if the said acceptance is not filed as aforesaid, then this ordinance shall be null and void, without any resolution, ordinance or act of any kind whatsoever on the part of the City of Tacoma.

Sec. 18. That at the time of the acceptance of this franchise, said grantee shall deposit with the City Treasurer of the City of Tacoma, the sum of twenty five hundred dol-

lars, as a guarantee that he will commence the construction of said telephone system as herein provided and will expend within said time the amount herein provided. In case said grantee shall fail to do so without any fault on the part of the City, then the said grantee waives, relinquishes and absolutely forfeits all right whatever in law or equity which he may have to said twenty-five hundred dollars; provided, however, that when said grantee, his successors or assigns shall have expended fifty thousand dollars in the construction and equipment of said telephone system, said City [fol. 237] Treasurer shall return and pay over to said grantee or his order the full and complete sum of twenty-five hundred dollars so deposited.

Sec. 19. That any neglect, failure or refusal to comply with any of the conditions of this franchise or grant shall render the same subject to forfeiture.

Sec. 20. By the acceptance of this franchise the grantee, its successors or assigns, hereby expressly agree that when any portion of the City of Tacoma is without telephone service, and the number of persons in such locality desiring the same shall equal at least one subscriber for every three hundred feet of new pole line required to reach said new subscriber, the same shall be installed by said grantee, its successors or assigns, within six months after application is made for same; and it is further expressly agreed that the charges for the same kind of telephone service shall be uniform throughout the city.

Sec. 21. The City of Tacoma reserves the right to make any reasonable amendment of this ordinance which necessity may require, having due regard, however, to the vested rights, and business interests, of the grantee, his successors and assigns.

Passed December 6, 1905.

(Signed) Frank M. Lamborn, President of City Council pro Tem.

Attest: (Signed) L. W. Roys, City Clerk.

Approved —— —, 1905. —— ——, Mayor.

The above ordinance was presented to the Mayor for his approval December 7, 1905, and returned by him with his objections in writing, December 13, 1905.

[fol. 238] The objections of the Mayor were ordered spread upon the Journal and the Council proceeded to vote upon the question, "Shall the ordinance pass notwithstanding the objections of the Mayor?"

Passed on roll call. Yeas, 15; nays, 0; absent, 1.

(Signed) L. W. Roys, City Clerk.

[fol. 239] EXHIBIT B-1

Independent Telephone Co., 1115 Fourth Avenue, Seattle

To the City Clerk of the City of Tacoma:

I hereby accept the franchise and ordinance No. 2522 passed by the City Council of the City of Tacoma, December 13th, 1905, and duly published on the 15th day of December, 1905.

Dated this 25th day of January, 1906.

(Signed) Edward E. Webster.

Filed with City Clerk January 25, 1906.

(Signed) L. W. Roys, City Clerk.

STATE OF WASHINGTON,
County of Pierce, ss:

I, Genevieve Martin, City Clerk of the City of Tacoma, Pierce County, Washington, hereby certify that the foregoing is a full, true and correct copy of Ordinance No. 2522 of the City of Tacoma, passed by the City Council December 6, 1905, and passed again over the Mayor's objections on December 13, 1905, with record of second vote thereon, together with copy of acceptance of the ordinance and franchise by Edward E. Webster, the grantee thereunder.

In witness whereof, I have hereunto set my hand and the official seal of the City of Tacoma this 16th day of February, 1925.

(Signed) Genevieve Martin, City Clerk. (Seal.)

[fol. 240] EXHIBIT B-2

This agreement made this 5th day of January, 1916, by and between the Sunset Telephone and Telegraph Company, a corporaton organized under the laws of the State of California, the party of the first part, and the Pacific Telephone and Telegraph Company, a corporation organized under the laws of the State of California, the party of the second part.

Witnesseth:

That whereas, the City of Tacoma, by its Ordinance No. 2522, entitled "An Ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain underground conduits, cables and wires, and to construct necessary manholes, make house connections and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an Automatic telephone system, and telegraph system and business, in the City of Tacoma," passed December 15, 1905, did grant to Edward E. Webster, his successors and assigns, a certain telephone and telegraph franchise; and

Whereas, the party of the first part is now the owner and holder of said franchise; and

Whereas, the said city, by its Resolution No. 6549 passed by a two thirds vote of all the members of the City Council, on the 29th day of December, 1915, has provided as follows:

"Whereas, a settlement of all matters of difference and account has been made between the City of Tacoma and the Sunset Telephone and Telegraph Company, as of January first, 1916; said company now being the assignee of the Home Telephone and Telegraph Company, assignee of Ed-
[fol. 241] ward E. Webster, grantee of the franchise and privileges conferred by Ordinance No. 2522; and

"Whereas, said Sunset Telephone and Telegraph Company has expressed a desire to assign said franchise and privileges to the Pacific Telephone and Telegraph Company;

"Now therefore,

"Be it resolved by the Council of the City of Tacoma:

"That upon the filing with the City Clerk of a copy of said proposed assignment this council will pass an ordinance assenting thereto."

Now therefore, in consideration of the sum of ten dollars ($10) paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part does hereby grant, bargain, sell, convey, transfer, assign and set over unto the party of the second part, its successors and assigns, all the rights, franchises and privileges granted to Edward E. Webster by Ordinance No. 2522 of the City of Tacoma, together with all the conduits, poles, wires and appliances of every kind and description of the party of the first part in the City of Tacoma, and all the property of every kind and nature of the party of the first part in the City of Tacoma.

Provided, however, that this asignment and conveyance shall not become effective unless and until the said city, by an ordinance duly passed by a two thirds vote of all the members of the City Council, shall authorize and consent to the same.

In witness whereof, the parties hereto have hereunto caused their corporate names to be signed and their corporate seals to be hereunto affixed by their respective officers [fol. 242] thereunto duly authorized, the day and year first above written.

Sunset Telephone and Telegraph Company, by G. E. McFarland, President. F. W. Eaton, Secretary. (Seal.) The Pacific Telephone and Telegraph Company, by G. E. McFarland, President. F. W. Eaton, Secretary. (Seal.)

I, F. W. Eaton, Secretary of The Pacific Telephone and Telegraph Company, do hereby certify that the foregoing is a full, true and correct copy of a certain agreement this day made, executed and delivered by Sunset Telephone and Telegraph Company to The Pacific Telephone and Telegraph Company, and that the signatures of the President and Secretary of said corporations respectively annexed to said agreement are genuine.

In witness whereof, I have hereunto set my hand and the seal of said The Pacific Telephone and Telegraph Company this 5th day of January, 1916.

F. W. Eaton, Secretary of the Pacific Telephone and Telegraph Company.

[fol. 243] EXHIBIT B-3

Ordinance No. 6319

By Atkins:

An ordinance granting the consent of the City of Tacoma to the Sunset Telephone & Telegraph Company, a corporation, to assign the franchise granted by ordinance No. 2522 to Edward E. Webster, his successors and assigns, and the property held and used thereunder, to the Pacific Telephone and Telegraph Company.

Whereas, by Ordinance No. 2522 there was granted to Edward E. Webster, his successors and assigns, the right, franchise, privilege and authority to lay and maintain underground conduits, cables and wires, and to construct necessary manholes, make house connections, and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an automatic telephone system and telegraph system and business in the City of Tacoma, which ordinance was passed on December 13, 1905, notwithstanding the objections of the Mayor of said city, and was duly published as required by law and the City Charter; and

Whereas, the said Webster heretofore assigned said franchise to the Home Telephone Company of Puget Sound, pursuant to consent therefor given by Ordinance No. 2694; and

Whereas, heretofore by operation of law, to wit: the foreclosure of a mortgage and sale thereunder, the ownership of the said franchise and the property held and used thereunder passed to the Sunset Telephone & Telegraph Company; and

Whereas, said Sunset Telephone & Telegraph Company has assigned said franchise and the property held and used thereunder to the Pacific Telephone and Telegraph Com-

[fol. 244] pany and has filed with the City Clerk a copy of said assignment, with a request that the City of Tacoma assent to the same; and

Whereas, the said Sunset Telephone and Telegraph Company has satisfied and relinquished its just claim against the City for telephones furnished to the City during the years from January 1, 1912, to January 1, 1916, in excess of those contracted to be furnished free; now, therefore,

Be it ordained by the City of Tacoma:

Section 1. That the consent of the City of Tacoma be, and the same is hereby given to the said Sunset Telephone & Telegraph Company to assign, transfer and set over to the Pacific Telephone and Telegraph Company, a corporation, the franchise and all rights, privileges and authority therein granted by Ordinance No. 2522, entitled: "An ordinance granting to Edward E. Webster, his successors and assigns, the right to lay and maintain underground conduits, cables and wires and to construct necessary manholes, make house connections, and to erect poles and thereon to fasten wires in the streets and alleys, and to operate an automatic telephone and telegraph system and business, in the City of Tacoma," and the property held and used thereunder. And the said Pacific Telephone and Telegraph Company shall take the same subject to all the terms and conditions set out and contained in said ordinance.

Passed February 9, 1916.

(Signed) A. V. Fawcett, Mayor

Attest: (Signed) W. D. Nickeus, City Clerk.

[fol. 245] State of Washington,
County of Pierce, ss:

I, Genevieve Martin, City Clerk of the City of Tacoma, Pierce County, Washington, hereby certify that the foregoing is a full, true and correct copy of Ordinance No. 6319 of the City of Tacoma, passed by the City Council on February 9, 1916, together with certified copy of agreement between the Sunset Telephone and Telegraph Company and The Pacific Telephone and Telegraph Company, dated January 5, 1916.

In Witness Whereof, I have hereunto set my hand and the official seal of the City of Tacoma this 16th day of February, 1925.

(Signed) Genevieve Martin, City Clerk. (Seal.)

[fol. 246] EXHIBIT C

BEFORE THE PUBLIC SERVICE COMMISSION OF WASHINGTON

In the Matter of Application of THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Application No. 1, to Waive Thirty Days' Statutory Notice

Comes now the petitioner herein and shows the Commission as follows:

(1) That it desires to continue in force the petitioner's rules, rates, charges and regulations in effect July 31st, 1919, now on file with the Public Service Commission of Washington (or attached hereto), the same having been authorized by the Postmaster General and as of record in Case No. 4747 before the Public Service Commission of Washington and as our letter of August 5th, 1919, attached hereto, marked "A."

(2) That the reason and cause for asking a waiver of the thirty days' statutory notice is that the petitioner's property having been returned to it by the Postmaster General and the Attorney General of the State of Washington having advised that the intra-state rate in effect July 31st, 1918 would automatically become re-effective upon such return in which case serious disturbance, loss and injury to the petitioner's business would result and petitioner having been without opportunity prior to August 1st, 1919, to file a new tariff giving the required thirty [fol. 247] days' statutory notice, this application is filed for relief. *(See Note.)

(Name of petitioner:) The Pacific Telephone and Telegraph Company, (Name of officer and title:) by James T. Shaw, Attorney, by A. E. Boyles.

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*This application is made with the distinct understanding on the part of the petitioner that in the event any of the rates, rules, regulations or charges herein referred to are challenged, the burden of proof as to the justness, reasonableness and sufficiency thereof shall be and remain with this petitioner herein.

State of Washington,
County of Thurston, ss:

I, A. E. Boyles, being first duly sworn, deposes and says that I am an authorized representative of the Pacific Telephone and Telegraph Company, petitioner herein; that I have read the foregoing application, and have knowledge of the facts therein stated and the same are true as I verily believe.

A. E. Boyles.

Subscribed and sworn to before me this 8th day of August, 1919. W. J. Foster, Notary Public in and for the State of Washington. (Seal.)

[fol. 248] The Public Service Commission of Washington

Order No. 3158

The Commission having considered the foregoing application,

It is ordered, That leave be granted petitioner to continue in effect the rates, rules and regulations above named, effective August 1st, 1919, until further ordered by the Commission.

Dated Olympia, Washington, August 8, 1919.

The Public Service Commission of Washington. A. A. Lewis, Frank R. Spinning.

Attest: J. H. Brown, Secretary.

The Pacific Telephone and Telegraph Company

Portland, August 5th, 1919.

The Public Service Commission of Washington, Olympia, Washington:

Gentlemen: Under date of November 4th we filed with your Commission exchange rates, rules and regulations for each and every exchange in the State of Washington. This exchange tariff is numbered W. P. S. C. No. 2, effective November 15, 1918. Under date of December 7, 1918, we

filed copy of Bulletin No. 15 issued by the Postmaster General under date of November 18, 1918, and effective December 1, 1918, being a modification of Service Connection Charges and Moving Charges effective under the Postmas-
[fol. 249] ter General's Order No. 1931 and Bulletin No. 8. On January 2, 1919, we filed exchange rate schedule covering change of name.

The exchange tariffs approved by and filed as hereinabove set out under the direction of the Postmaster General and under your Commission's order dated February 20, 1919, in case No. 4747, effective on and after March 1, 1919, and the toll and telegraph rates as enumerated in our letter of July 25th, 1919, together with a toll and telegraph tariff in complete form forwarded to your Commission with our letter of July 25, 1919, we now specifically refer to and designate as the official filing of rates under which The Pacific Telephone and Telegraph Company is operating in the State of Washington as required by statute.

Yours truly, The Pacific Telephone and Telegraph Company. H. D. Pillsbury, Vice-President and General Attorney, by James T. Shaw.

[fols. 250-377] State of Washington,
County of Thurston, ss:

I hereby certify that the attached is a full, true and correct copy of the original application of the Pacific Telephone and Telegraph Company to continue in force petitioner's rules, rates, charges and regulations in effect July 31, 1919, together with a certain letter written by the Pacific Telephone and Telegraph Company to the Public Service Commission of Washington dated August 5th, 1919, and attached to said application as "Exhibit A," together with Order No. 3158 of the Public Service Commission of Washington, issued August 8th, 1919, granting said application.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington this 2nd day of February, 1925.

Sam L. Crawford, Secretary of Department of Public Works of Washington.

[File endorsement omitted.]

[fol. 378] In United States District Court

Report of Special Master—Filed September 15, 1925

Franchise Contract as to Rates

Findings of Facts

This question is presented by the "Affirmative Answer and Defense" of the defendants in the Pacific Company Case No. 166-E, set forth at pages 19 to 36 of their printed answer; and by the "Affirmative Answer and Defense" of the defendants in the Home Company Case No. 167-E, set forth at pages 8 to 11 of their typewritten answer. (No printed answer is before me.) The ordinances and other acts which form the basis of the claim of a franchise contract as to rates are set forth as exhibits and attached to said answers.

As to the City of Tacoma, the exhibits attached to defendants' answer in the Pacific Case were admitted by plaintiffs' counsel as pleaded and (see pp. 1909 to 1911, Transcript of Testimony) were as follows:

Exhibit B being Ordinance No. 2522, City of Tacoma, and found at pages 56 to 67 of printed answer in the Pacific Company Case, and Exhibit B-1, being an acceptance of the franchise and Ordinance No. 2522 found at page 68 of said printed answer, and Exhibit B-2, being an assignment of the franchise of said Ordinance No. 2522 to the Pacific Telephone and Telegraph Company, being found at pages 69 to 71 of said answer and Exhibit B-3, being Ordinance No. 6319, consenting to the assignment of the fran-[fol. 379] chise granted under Ordinance No. 2522 and being found at pages 72 and 73 of said printed answer.

As to the City of Seattle, Defendants' Exhibits Nos. 27, 28, 29 and 30 and Plaintiffs' Exhibits Nos. 101 and 102, all in the Pacific Case, were admitted in evidence. The allegations pleaded were not all admitted as pleaded but the evidence in relation thereto is to be found at pages 1912 to 1930 (Transcript of Testimony) and said exhibits were as follows:

Ordinance No. 6498, City of Seattle, granting a franchise to John S. McGroarty and George C. Blanker, shown as

Exhibit A-1, pages 48 to 50 inclusive of said printed answer, same being also Defendants' Exhibit No. 27 in the Pacific Company case. The acceptance of said ordinance is Defendants' Exhibit No. 28 in Pacific Case. Ordinance No. 7143, amending Ordinance No. 6498 and consenting to the transfer of the franchise to the Independent Telephone Company, shown as Exhibit A-2, shown at pages 51 to 55 inclusive of said printed answer, and is also Defendants' Exhibit No. 29 in the Pacific Case. The transfer of the franchise from the Pacific Company to F. H. Crosby is Defendants' Exhibit No. 30 in the Pacific Case.

As to the City of Spokane, the exhibits attached to the answer in the Home Case were admitted by plaintiffs as pleaded (see pages 1503 to 1505, Transcript of Testimony), and were as follows:

Ordinance No. A2118, being Exhibit A attached to the typewritten answer of the defendants in the Home Case, is the ordinance granting a franchise to the Home Tele-[fol. 380] phone and Telegraph Company found immediately following page 11 of said typewritten answer and being marked Exhibit A and being numbered pages 1 to 12 inclusive. Ordinance No. A4079, being Exhibit B and amending section 13 of said Ordinance No. A2118, being marked Exhibit B and being numbered pages 1 and 2 and being found at the end of said typewritten answer.

The discussions as to this subject are found in the parties' briefs as follows:

Plaintiff's Brief (typewritten page 166 and printed page 173);

Defendants' Brief (typewritten page 2 and printed page 2);

Defendants' Brief (Winston's typewritten page 9);

Plaintiffs' Reply Brief (typewritten page 69 and printed page 72).

In the Public Service Commission Law of 1911, passed by the legislature of this state, the Public Service Commission was authorized to modify those franchise rates and terminate them. Section 43 of the Public Service Commission Law of 1911, being Chapter 117 of the Session Laws of 1911 at page 567 and being Section 10379 of Remington's Compiled Statutes, authorizes the Public Serv-

ice Commission to modify franchise contracts as to rates stipulated in said contracts. Said section is as follows:

"Sec. 10379. Existing Contracts—Effect.—Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its lines, equipment or service under any contract or [fol. 381] contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. (L. '11, p. 567, sec. 43.)"

On August 1, 1918 Postmaster General took charge of Pacific and Home Telephones, under authority of a Congressional Resolution.

February 13, 1919, Public Service Commission of Washington made an order establishing the Postmaster General Rates as the rates of the Pacific Company and expressly directed a termination of the franchise rates, and a similar order was made as to the Home Company on March 20, 1919. (See Reports of Public Service Commission of Washington, 1918-1919, pp. 155 to 171, as to Pacific Company and Reports of Public Service Commission of Washington, 1918, 1919, pp. 171 to 182, as to the Home Company.)

August 1, 1919, Postmaster General returned the telephones to the Pacific and Home Companies.

August 8, 1919, the Public Service Commission, upon petition of the Pacific Company, entered an order granting leave to the Pacific Company to continue in effect the rates prescribed by the Postmaster General until the further order of the Commission. The Commission, in cause No. 3158 at page 228 of their Report for 1918-19 waived [fols. 382-406] the 30 day notice requirement for hearing of this petition. A copy of this petition and the order of

the Commission is to be found at pages 75 to 79 of defendants' printed answer in the Pacific case.

March 3, 1920, the order of February 13, 1919 was held invalid by the Supreme Court of Washington in State ex rel. Seattle v. Public Service Commission, 110 Wash. 130, upon the ground that the State Public Service Commission had no jurisdiction because the telephones were in charge of the Postmaster General.

The order of August 8, 1919, does not seem to affect the Home Company. The only attempts to affect the Home Company franchise rates is the order of February 13, 1919, which was held invalid by the Supreme Court of the State of Washington in 110 Washington 130, and the order of March 31, 1923.

I do not deem it advisable to set forth in my findings in hac verba the several exhibits heretofore referred to in relation to this subject because I believe it will be readily conceded that the rates claimed by plaintiffs to avoid confiscation are higher than the franchise rates and the questions arising therefrom are questions of law.

[fol. 407] In United States District Court

Exceptions to Report of Special Master—Filed October 2, 1925

* * * * * * *

They except to the conclusion of the Master (pp. 120, 121; p. 135, printed copy) that the order of the department of public works fixing new rates, terminated instead of amending the franchise rates, for the reason that the same is contrary to law in that it fails to give proper effect to the state statute and assumes jurisdiction for the Federal court over rates which can only be further modified by the department of public works in the manner provided by statute.

* * * * * * *

[fol. 408] 36

They except to the conclusion of the Master (p. 126; p. 143, printed copy) that the effect of the making and enforcing of the order of the department of public works, of March 31, 1923, as of June 30, 1922, was to confiscate the property of the plaintiff by fixing too low valuations and by denying the proper allowance for depreciation and four and one-half per cent. contract, for the reason that the same is contrary to the law and the evidence, for the specific reasons heretofore assigned with respect to the various elements of value and expense.

37

They except to the conclusion of the Master (p. 126; p. 143, printed copy) that the temporary injunction heretofore granted in this case be made permanent, for the reason that same is contrary to the law and the evidence, for the specific reasons assigned in preceding exceptions.

38

They further except to the conclusion of the Master (p. 126) that the temporary injunction be made permanent, for the reason that such conclusion is wholly unsupported by the findings or conclusions of the Master with respect to the effect of said order, on the property and revenues of the plaintiff, subsequent to June 30, 1922, and is wholly unsupported by any finding or conclusion of the Master that the property of the plaintiff has been confiscated since June 30, 1922, or is now being confiscated by reason of any [fol. 409] order of the department of public works. (Test. pp. 1588 to 1595).

Dated this 1st day of October, 1925.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants. Thos. J. L. Kennedy, E. K. Murray, of Counsel.

[File endorsement omitted.]

[fol. 410] IN UNITED STATES DISTRICT COURT

Before Rudkin, Circuit Judge, and Neterer and Webster, District Judges

OPINION—Filed April 22, 1926

WEBSTER, District Judge:

These cases, by agreement of counsel consolidated for [fol. 411] the purpose of taking testimony before the Special Master, have been dealt with by him in a single report, and will therefore be considered together. No attempt will be made to detail the history of this complicated and protracted litigation as it has taken its course through State and Federal Courts. For the purpose of our present inquiries it will perhaps suffice to say that on March 31, 1923, the Department of Public Works of the State of Washington (hereinafter called the Department) made two orders affecting these plaintiffs, one purporting to determine for rate making purposes the value of the property of the Home Telephone and telegraph Company of Spokane (hereinafter called the Home Company), and the other a like order fixing the value of both the intrastate and interstate property of the Pacific Telephone and Telegraph Company (hereinafter called the Pacific Company). A few days later these suits were commenced by these two companies, alleging that the rate orders promulgated by the Department were confiscatory of the property of the companies respectively, and consequently in violation of the Federal Constitution. The cases are now before the Court pursuant to Section 266 of the Judicial Code as amended upon exceptions to the report of the Special Master, to whom the cases were in due course referred.

The Special Master found the fair and reasonable value of the Pacific Company's intrastate property devoted to the public service, as of June 30, 1922, to be $31,425,403.75 including average working capital; to which there should be added $720,000.00 found to be the "going concern value" of that Company's property, making a total value or rate basis on which that Company was entitled to a fair and reasonable return of $32,145,403.75; and the equivalent figure for the Home Company was fixed at $4,548,021.76.

[fol. 412] The Special Master further found the fair and reasonable rate of return which the companies were entitled to earn as of June 30, 1922, to be seven and one-half per centum per annum. In addition he found that the net revenue of the Pacific Company as of June 30, 1922, was $928,081.97, and the corresponding figure for the Home Company was $126,081.97, on the basis of the rates then allowed, and that these revenues would produce a return of less than three per centum per annum for each company. From these findings he concluded as a matter of law that the effect of enforcing the orders of the Department complained of would be to confiscate the property of the companies respectively, and recommended that a permanent injunction be granted restraining the Department from putting such orders into effect. The correctness of these Findings and Conclusions is now challenged by exceptions, which give rise to the following principal questions:

One. What is the fair and reasonable value of the properties of the two companies respectively which is held for and used in the public service—that is to say, what is the proper value of such properties as the lawful basis for a rate structure.

Two. In determining this, should working capital be allowed.

Three. Should "going concern value" be taken into account, and if so, how should such amount be ascertained.

Four. What amount should properly be deducted for depreciation, and how is this amount to be arrived at.

Five. Are the licensee contracts involved valid and to be given their face effect.

And, finally, what was a proper rate of return to be al- [fol. 413] lowed each Company upon the property devoted by it to the public use as of June 30, 1922.

The subordinate and incidental problems to which these major considerations necessarily give rise will be noticed in their proper places and connections.

At the threshold we face the query—what were the physical properties of the companies respectively as of June 30, 1922? During 1913, 1914 and 1915, at a cost of

approximately $125,000.00, the Pacific Company made a detail and complete inventory of all its property in the State of Washington. As to central office equipment, buildings, and certain other important items of property an actual field count and appraisal was made. In case of other classes of property as careful and accurate a survey was made as of the nature of the millions of small items comprising it rendered practicable. This inventory and appraisal consisted of fifty-four volumes containing an average of four hundred pages each. It was completed in the early part of 1915, and subsequently was brought down to December 31, 1921, by a system of accounting supplemented by various and numerous field checks. The work was in charge of an expert in such matters, who testified: "It is as close a determination of the precise facts as it is humanly possible to make it." There is little in the record challenging the correctness of this appraisal and the Special Master was amply justified in finding that it is as accurate, thorough and complete as it is practical to make it, and is all that should in reason be required. The cost of reproducing the property of the Home Company, with the exception of its going concern value, was stipulated by the parties and therefore needs no discussion. Taking then the detailed inventory and the stipulation as the basis of the physical properties of the two companies, we pass nat- [fol. 414] urally to the ascertainment of the proper rules to be followed, the proper elements and factors to be considered, in fixing the value of such property for rate making purposes.

In Smyth v. Ames, 169 U. S. 466, pp. 546-547, the Supreme Court said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular

rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

In Willcox v. Consolidated Gas Company, 212 U. S. 19, p. 52, the Supreme Court said:

"If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, etc."

[fol. 415] In the Minnesota Rate Cases, 230 U. S. 352, p. 454, this principle is stated:

"The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

In Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S. 276, the Public Service Commission undertook to value the property there involved without according any weight to the greatly enhanced cost of material, labor and supplies. In reviewing this action, at page 287 of the opinion, the Court said:

"It is impossible to ascertain what will amount to fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

In Bluefield Water Works and Improvement Company v. Public Service Commission, 262 U. S. 679, p. 689, this language is found:

"The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1915 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation [fol. 416] tion, at 1920 prices, appears to have been wholly disregarded. This was erroneous."

Federal and State cases holding to the same view almost without number might be cited. It is true that in the case of Georgia Railway and Power Company v. Railroad Commission, 262 U. S. 625, the Supreme Court said:

"The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct."

The facts of this case, however, and its subsequent history, clearly indicate that the reason for this statement was that at the time of making the estimation of values the prices prevailing were abnormal or peak prices which afforded no true or just criterion of reproduction costs under stable or normal economic conditions. Plainly, the rule of reproduction cost less depreciation is not an invariable and inflexible one, to be arbitrarily applied in all cases without regard to other factors and elements. To be sure, there must be no slavish adherence to it. Like most general rules it has exceptions, limitations, and qualifications, and must always be applied to concrete facts with due regard for the fundamental consideration that the utmost any public utility can rightfully demand at the hands of rate making bodies is such compensation for the use of its property as will, under all the circumstances existing at the time, be just, both to it and to the public. A careful study of the cases, however, leads unerringly to the conclusion that one of the most important factors, if not the dominant factor, in determining the true basis of rate making for public utilities is the cost [fol. 417] of reproduction new less depreciation of the property of the utility devoted to the public convenience, at the time of making the rates, provided such cost fairly reflects normal and stable prices prevailing at the time, and

also prices which will with reasonable certainty continue to prevail throughout the period covered by the rates fixed, so far as reasonable human foresight, measuring the future by the present and the past, can determine. This is what the utility is supplying for the public service, and it is this of which it would be unjustly deprived by confiscatory rates, fares, tolls, or charges.

There is practically no controversy concerning the original cost of the properties of the two companies. This item was in effect stipulated by the parties.

The Department, in its orders of March 31, 1923, which gave rise to this litigation, took for the basis of its promulgated rates the original cost of the properties to the companies respectively, and gave no consideration to any other elements or factors of value, this being done on the prudent investment theory which the decisions of the Supreme Court of Washington seem to hold is the method required by the state statute defining the powers of the Department.

> Pacific Coast Elevator Company v. Department, 130 Wash. 620.
>
> State ex rel. Spokane Gas Company v. Kuykendall, 119 Wash. 107.

This method of valuation was rejected by the Special Master. In its stead he applied the rules announced in Smyth v. Ames, supra, as explained and qualified by the later holdings of the Supreme Court, attaching no importance to the factor of the value of stocks and bonds upon the authority of the Minnesota Rate Cases, supra. In so doing he was [fol. 418] clearly right. Granting the correctness of the method employed, there is little room for criticism of his calculations and conclusions as to the fair and reasonable value of the properties of the companies. No useful purpose would be served by following the labyrinth of details involved in his extremely burdensome task.

We pass now to the question of depreciation. From the cost of reproducing new the properties of the companies must be deducted depreciation, representing the difference between new property and property in the condition it was at the time of the estimate. How should this be done? In the case of the Home Company the amount of depreciation is stipulated, hence calls for no discussion. The ques-

tion of depreciation in the case of the Pacific Company presents a more difficult problem. The proper method for determining depreciation seems now quite well settled. In Pacific Gas and Electric Company v. City and County of San Francisco, 265 U. S. 403, p. 406, the Supreme Court said:

"Appellant objects to the application of this method and insists that depreciation should have been ascertained upon full consideration of the definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation for the definite purpose of ascertaining existing facts, we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities."

In other words, its was held that accrued depreciation is to be ascertained by an inspection of the property—by [fol. 419] going and looking at it and making estimates based upon the facts which such examination discloses.

To the same effect see:

New York Telephone Company v. Prendergast, 300 Fed. 822.

Southern Bell Telephone and Telegraph Company v. Railroad Commission, 5 Fed. (2d) 77.

Westinghouse Electric & Mfg. Company v. Denver Tramway Company, 3 Fed. (2d) 205.

Landon v. Court of Industrial Relations, 269 Fed. 433.

On the question of depreciation the companies produced witnesses Blanck and Fleager, while the defendants called on this point witnesses Hill, Wray and Green. The Special Master, with commendable painstaking and scrutiny, examined the conflicting evidence and concluded that the testimony of witnesses Blanck and Fleager, in view of their superior experience and opportunities, and notwithstanding the fact that they were employees of the Pacific Company, was the more satisfactory, convincing and dependable. The record convinces us that he was justified in taking this

view of the matter. To undertake to fortify this conclusion by minute analysis of the voluminous record would but serve unduly to lengthen this opinion without giving it added value.

It seems plain from the record, and the Special Master so found, that the three and one-half per centum per annum of the depreciable property of the companies fixed by the Department was not sufficient to take care of the actual depreciation which was bound to occur, and was intentionally fixed at a lesser amount for the purpose of reducing what it conceived to be an excessive depreciation reserve fund. Such a method finds little support in law or reason. [fol. 420] The depreciation to be taken into account in ascertaining the rate base is that diminution in the value of the property involved which takes place in the physical thing and is ascertained by a physical inspection of it—not the future depreciation which inevitably comes about by wear, tear, obsolescence, and the like. The ascertainment of the amounts necessary for the latter purpose sheds no light on the present value of the properties of the companies for the purpose of present rate making. Indeed, it was not fixed by the Department for any such purpose. The precise question of whether it is permissible for a rate making body to reduce what it considers an excessive depreciation reserve fund by making inadequate provision for future depreciation was considered in New York Telephone Company v. Board of Public Utility Commissioners, 5 Fed. (2d) 245, and the practice was condemned.

The amount of average working capital of both companies was stipulated by the parties and was properly taken into account by the Special Master under the authorities already cited.

In the hearing before the Special Master it was not disputed that in a case presenting proper proof thereof "going value," "going concern value," or "value of plant in successful operation" (which are synonymous terms) should be taken into account. The Special Master aptly defines this item in the following language:

"This is the additional value that a purchaser will give for the properties and business of the companies because they are going concerns with established business. * * *

This additional value, over and above the fair and reasonable value of the physical properties plus the working capital, which a customer would pay for the property be- [fol. 421] cause it is a going concern, and which additional value we call 'going value,' does not depend upon past losses in operations, successfully survived, or in expenditures, wisely made, contributing to 'going value,' but they are not the measure of the amount of 'going value.' "

He studiously avoided making any allowance for development cost and likewise repudiated the theory of capitalization of the net balance of alleged past deficits. He rightly held that this item of value rests largely in competent or expert opinion, and accepted in the case of the Pacific Company the amount testified to by the defendants' expert Mr. Green. Under the authorities there can be little doubt as to the correctness of his action in this respect. As to the amount allowed, the defendants' view was accepted and they are in no position to complain. For cases discussing going value and the propriety of its allowance as an intangible part of the rate base, see:

Galveston Electric Company v. Galveston, 258 U. S. 388.

Houston v. Southwestern Bell Telephone Company, 259 U. S. 318.

Georgia Railway and Power Company v. Railroad Commission, 262 U. S. 625.

Mobile Gas Company v. Patterson, et al., 293 Fed. 208.

Pacific Gas and Electric Company v. San Francisco, 273 Fed. 937.

In the case of the Home Company, for want of proper proof, no allowance of going concern value was made.

We pass now to a consideration of the licensee or so-called four and one-half per cent. contracts. These are contracts [fol. 422] whereby the Pacific Company and the Home Company pay to the American Telephone and Telegraph Company four and one-half per cent. of the gross revenues of the companies respectively, for which the American Company supplies to the Pacific Company and the Home Com-

pany certain instrumentalities, appliances, patents, and services, not necessary to detail. The Department, in its orders of March 31, 1923, held that these contracts were wrong in principle and contrary to public policy, and substituted in lieu of the percentage of revenue payment as provided in the contracts an annual per station charge of ninety cents. The Special Master took proof touching the validity of these contracts and found as a fact that they were of great value to the Pacific and Home companies as well as to the public, and were not contaminated with fraud or bad faith. As a matter of law he concluded that they were valid obligations, and the amounts paid under them lawful expenditures. As we read the cases, the question presented by this aspect of the case has been foreclosed by the Supreme Court. In Houston v. Southwestern Bell Telephone Company, 259 U. S. 318, p. 323, the court said:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone & Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished and that, for this [fol. 423] unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business, but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone & Telegraph Company controlled the company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of

their dealings to prevent imposition upon the community served by the Company, but the court recognized and applied this rule. Here again, the evidence introduced by the City was meager and indefinite, while that of the Company was exceptionally full and complete, and both contentions must be denied."

Again, in State of Missouri ex rel. v. Public Service Commission, 262 U. S. 276, 288, in dealing with those contracts the Court said:

"The important item of expense disallowed by the Commission—$174,048.60—55% of the 4½% of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors [fol. 424] has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company, 291 Ill. 209, 234.

"'The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'"

For additional cases to the same effect, see:

State v. Southwestern Bell Telephone Company (Kansas), 223 Pac. 771.

Indiana Bell Telephone Company v. Public Service Commission, 300 Fed. 190.

Chesapeake and Potomac Telephone Company v. Whitman, 3 Fed. (2d) 938.

Southern Bell Telephone and Telegraph Company v. Railroad Commission, 5 Fed. (2d) 77.

Northwestern Bell Telephone Company v. Spillman, 6 Fed. (2d) 663.

Cincinnati v. Public Utility Commissioners, 149 N. E. 817.

An examination of the foregoing cases leaves no doubt as to the validity of those contracts and that the amounts paid under them are properly chargeable to operating expenses.

[fol. 425] At this point it seems convenient to consider the contention of counsel that the Pacific and Home Companies are bound by orders of the Department entered on March 31, 1923, because in the case of the Pacific Company it did not appeal to the State Courts as provided by the State statute, and in the case of the Home Company it did not prosecute its appeal in time. Prior to March 31, 1923, however, the Supreme Court of Washington had construed the state statute as meaning that in fixing valuations for rate purposes the Department should not recognize the theory of reproduction new less depreciation, but was confined to the cost method prescribed by the statute.

State ex rel. City of Spokane v. Kuykendall, 119 Wash. 107.

And on September 22, 1924, subsequent to the orders complained of, in Pacific Coast Elevator Company v. Department, 130 Wash. 620, this holding was approved and redeclared. It is obvious therefore that an appeal to the State Courts by the companies would have been an idle and useless formality. Moreover, the plaintiffs here are seeking relief against the orders of the Department upon the ground that such orders are confiscatory, and therefore in violation of the Federal Constitution. In such a case it is clear that the Federal tribunals are not bound by the action of the State Department, but it is their imperative duty to exercise an independent judgment on both law and facts. It has been pointedly so held in a number of cases.

Bluefield Company v. Public Service Commission, 262 U. S. 679.

[fol. 426] Ohio Valley Water Company v. Ben Avon Borough, 253 U. S. 207.

Monroe Gaslight and Fuel Company v. Public Utilities Commission, 292 Fed. 139.

Van Wert Gaslight Company v. Public Utilities Commission, 299 Fed. 670.

With respect to the question of the proper rate of return to be taken into consideration in determining whether the orders of the Department complained of are confiscatory, the Special Master concluded that a return of less than seven and one half per centum upon the fair value of the property, plus working capital and going concern value, would be confiscatory. The principles to be applied in determining what constitutes a confiscatory rate are stated by the Supreme Court in the Bluefield case, supra, as follows:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money [fol. 427] necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."

After reviewing former decisions of the courts dealing with the question, the Court uses this language:

"Investors take into account the result of past operations, especially in recent years, when determining the

terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it."

The conclusion reached was that a rate of return of six per centum upon the value of the property was substantially too low to constitute just compensation for the use of the property employed in rendering the public service. This opinion was handed down June 11, 1923. In the Southwestern Bell Telephone Company case, 262 U. S. 276, p. 288, decided May 21, 1923, the Supreme Court said:

"That 6% should be allowed for depreciation appears to be accepted by the Commission. Deducting this would leave a possible 5 1/3% return upon the minimum value of the property, which is wholly inadequate considering the character of the investment and interest rates then prevailing."

[fol. 428] In Pacific Gas and Electric Company v. City and County of San Francisco, 265 U. S. 403, decided June 2, 1924, the Master in Chancery had held that any rate of return less than seven per centum would be confiscatory. In reviewing this point, at page 405, the Supreme Court said:

"We think the evidence supports the finding that a net return of seven per centum was necessary in order to avoid confiscation."

In Consolidated Gas Company v. Prendergast, 6 Fed. (2d) 243, Judge Winslow upheld a rate of eight per cent. In Kings County Lighting Company v. Prendergast, 7 Fed. (2d) 192, a statutory three-judge court made up of Judges Manton, Campbell and Inch, approved a rate of eight per cent. In Indiana Bell Telephone Company v. Public Service Commission, 300 Fed. 190, a rate of eight per cent was sustained. In State v. Southwestern Bell Telephone Com-

pany, 223 Pac. 771, the Supreme Court of Kansas upheld a rate of eight per cent. We have noticed these cases particularly for the purpose of showing the trend of thought touching this matter, as disclosed by the latest expressions of the courts in various parts of the country. There was competent and reliable evidence amply supporting the conclusion of the Special Master. The proper principles, as defined by the courts, were applied, and the figure fixed by him was within the limits marked by the controlling cases. Moreover, this Court is not engaged in the task of fixing rates for public utilities, and even if it be thought that the rate of return fixed by the Special Master is excessive, it is obvious that, measured by a substantially lower rate of return, the orders of the Department here under [fol. 429] review would nevertheless be confiscatory, because of the improper rate base adopted by the Department.

In behalf of the cities of Seattle, Tacoma and Spokane, it is contended that the plaintiff companies are entitled to no relief because in these citis the companies were operating under franchises which prescribed rates substantially lower than those allowed by the Department, and that the franchise rates are controlling, particularly since the Department did not expressly and in pointed terms abrogate and cancel them. It cannot be doubted that where a franchise contract is entered into between a municipality and a public utility corporation fixing rates to be charged by the latter for a not grossly unreasonable period of time, such rates are binding and enforceable, even though confiscatory of the property involved.

> St. Cloud Public Service Company v. City of St. Cloud, 265 U. S. 352.

Nor can it be doubted that under the statutes of the State of Washington the Department has the power to abrogate and cancel such franchise rates if in a proper case it sees fit to do so Section 10379 of Remington's Compiled Statutes of Washington provides:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date this act takes

effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, [fol. 430] in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. (L. '11, p. 567, sec. 43.)"

Construing this statute in the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107, pp. 111-112, the Supreme Court of Washington said:

"By the act of 1911 (Laws of 1911, p. 561, par. 34) the terms of a franchise contract like the one in question here are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. State ex. rel. Ellertsen v. Home Tel. & Tel. Co., 102 Wash. 186, 172 Pac. 899. In the case of State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D 78, L. R. A. 1915C 287, it was decided that the public service commission law placed the entire subject of rate regulation under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be a duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case."

In this same case the point was urged that the Department, in fixing the new rates, did not in express terms cancel and [fol. 431] terminate the franchise rates. Answering this contention the Court said:

"The present order of the department of public works is just as effective as if, after fixing the rates, there had been

added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court. The Special Master concluded that the order of the Public Service Commission (now the Department of Public Works) entered on August 8, 1919, and after the termination of federal control of the properties, continuing in effect the rates established by the Postmaster General so far as the Pacific Company is concerned, and the orders of the Department to the same effect entered on March 31, 1923, as to both the Pacific and the Home Companies, had the effect of terminating and abrogating the franchise rates, and that the rates established by the Department in their stead became "Department" or "statutory" rates, as distinguished from "franchise" or "contract" rates. In this, we agree with him.

State ex rel. Spokane v. Kuykendall, supra.

It may be conceded that the Department was not obliged to grant any relief against the rates stipulated in the franchises, and that it could not by judicial action be compelled to do so. Yet, if it undertakes to terminate such rates pur- [fol. 432] suant to its plain statutory powers, the rates substituted instead must be fair, just and reasonable, if the plain mandate of the statute defining its duties is to be obeyed. And when the substituted rates are challenged they must be considered as statutory—not franchise—rates, and their character as being confiscatory, or not, must be measured by the principles of law applicable to such rates.

Vehement attack is made upon the Pacific Company's investment in switching machine apparatus for use in the City of Seattle. It is asserted that the outlay was unnecessary, unreasonable an injudicious. The Department, in its Pacific Company order of March 31, 1923, expressly found "the installation of machine switches in Seattle is justified." There is no evidence in the record which would warrant a contrary conclusion. Seattle is a progressive and rapidly growing city. Utilities which are equal to its pres-

ent requirements may be grossly inadequate in the reasonably near future. Public service companies cannot wait until their facilities break down or prove unequal to the demands upon them before making needful additions and improvements. Business judgment must be employed to anticipate reasonable future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the outlay to suggest dishonest, wasteful or imprudent expenditure. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making. In the absence of evidence to the contrary, investments may reasonably be assumed to have been made in the exercise of reasonable judgment.

[fol. 433] Missouri ex rel. v. Public Service Commission, supra.

See also:

Northwestern Bell Telephone Company v. Spillman, 6 Fed. (2d) 663.

The finding of the Special Master that this expenditure was judicious and proper is clearly right.

Counsel for the City of Spokane with great earnestness complains of the allocation of toll line charges under a contract between the Home Company and the Pacific Company. It is conceded that the amount received by the Home Company is substantially less than the actual cost of supplying the service. It is therefore contended that the arrangement is unconscionable. It is not apparent to us, however, how relief against that situation may be granted in this case. It appears, nevertheless, that contracts of the same kind—and in fact contracts less favorable to the small companies—are readily entered into all over the country by telephone companies, including independent as well as subsidiary companies. That such a division of the joint tolls, in spite of superficial appearances to the contrary, is not unwise or unconscionable would seem to be sustained by the fact that it embodies the customary and usual method of adjustment adopted by the parties, dealing in the light of practical experience in such matters.

City of Houston v. Southwestern Bell Telephone Company, 259 U. S. 318, p. 322.

The Special Master found that in view of all the pertinent consideration the contract was of great benefit to the Home [fol. 434] Company and its patrons. We do not feel justified in disturbing that finding.

For the foregoing reasons, the exceptions to the report of the Special Master will be overruled, and the permanent injunction recommended by him will be granted. A decree accordingly may be presented. Before finally passing the decree the amount of the allowance to cover the services of the Special Master will be determined.

[File endorsement omitted.]

[fol. 435] In United States District Court

Decree—Filed May 19, 1926

This cause came on to be heard on the 21st day of December, 1925 upon the report of the Special Master, John T. Condon, lately deceased, and the exceptions of the parties thereto, was argued by counsel for the respective parties, was then submitted, and having been duly considered, it is now ordered, adjudged and decreed as follows:

I

That each and all of the defendants' exceptions be and they are hereby overruled.

II

That the plaintiff's exceptions be and they are hereby overruled.

III

That the rates and charges prescribed by the Department of Public Works of the State of Washington, which said rates and charges are set forth in a certain schedule, a copy whereof is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "A," be and they hereby are decreed to be confiscatory in viola-

tion of the constitution of the United States; and that the order of said Department of Public Works imposing said [fol. 436] rates and charges, made on March 31, 1923, a copy of which said order is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "D," be and the same hereby is decreed to be void and of no effect.

IV

That said defendants, and each of them, their successors in office and all other persons, be and they are hereby forever restrained and enjoined—

First. From any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges prescribed by said Department of Public Works as set forth in said schedule Exhibit "A" or from any attempt to compel the plaintiff to continue to observe or maintain said rates and charges.

Second. From any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees from charging and collecting the rates and charges set forth in a certain schedule, a copy of which is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "F," until just and reasonable schedules and charges are established by law.

Third. From taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees for disregarding the rates and charges set forth in said Exhibit "A" or for charging and collecting the rates and charges set forth in said Exhibit "F" until just and reasonable schedules of rates and charges are established by law.

Fourth. That all bonds given by the plaintiff herein pursuant to the terms and conditions of the interlocutory [fol. 437] injunction entered in this cause on the 23rd day of July, 1924, are hereby cancelled and discharged, and the plaintiff and its sureties thereon are hereby released and discharged from all liability thereon.

Fifth. That plaintiff recover of the defendants and have judgment for its costs in this suit taxed — $18,068.02 including therein the sum of Six Thousand Dollars heretofore allowed by this court as the fee of the Special Master, and which said sum has been heretofore paid by the plaintiff to Marian Clark Condon, executrix of the estate of John T. Condon, deceased.

To all of which defendants except.

Done in open court this 8 day of May, 1926.

Frank H. Rudkin, Circuit Judge. Jeremiah Neterer, District Judge. Stanley R. Webster, District Judge.

[File endorsement omitted.]

[fol. 438] In United States District Court

Order of Substitution—Filed August 17, 1926

Now, on this day, the application of the defendants to substitute John C. Denney, Director of Public Works of Washington, in the place of Walter B. Whitcomb, and O. O. Caldethead, as Supervisor of Transportation of Washington, in the place of Frank R. Spinning, and to add C. Rea Moore, as Supervisor of Public Utilities of Washington, as defendants in the above entitled cause, came on to be heard, and it appearing to the court that the notice of motion for substitution and the affidavit of H. C. Brodie, one of the solicitors for defendants, have heretofore been filed in this court, and served upon Otto B. Rupp, Post, Russell & Higgins, and Pillsbury, Madison & Sutro, solicitors for plaintiff, and the court having listened to the arguments of counsel; It is

Ordered that John C. Denney, the Director of Public Works of Washington, be, and he hereby is, substituted as defendant herein in place of Walter B. Whitcomb, who on March 16th, 1925, resigned said office; that O. O. Calder-
[fol. 439] head, the *the* Supervisor of Transportation of Washington, be, and he hereby is, substituted as defendant

herein in place of Frank R. Spinning, who on July 31st, 1925, resigned said office; and that C. Rea Moore, the Supervisor of Public Utilities of Washington, be, and he is hereby, added as a defendant in the above entitled suit; all without prejudice to the proceedings already had in this action.

Done in open court this 17th day of August, 1926.

Frank S. Dietrich, Judge.

[File endorsement omitted.]

[fol. 440] In United States District Court

Assignments of Error—Filed August 17, 1926

Come now John C. Denney, as Director of Public Works of Washington, O. O. Calderhead, as Supervisor of Transportation of Washington, and C. Rea Moore, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, defendants in the above entitled cause, and file the following assignment of errors on which they will rely on their appeal from the decree entered in the above entitled cause on the 18th day of May, 1926:

I

The court erred in making and entering the decree of May 18th, 1926.

II

The court erred in overruling Defendants' Exception No. 33 to the Report of the Master.

[fol. 441] III

The court erred in overruling Defendants' Exception No. 37 to the Report of the Master.

IV

The court erred in overruling Defendants' Exception No. 38 to the Report of the Master.

V

The court erred in not finding that the plaintiff, up to and including January 21, 1926, and ever since the beginning of this action, was operating its exchange in the City of Seattle under a valid franchise contract which prescribed a maximum schedule of rates for both business and residence telephones and which franchise rates, as modified by the orders of the defendants and their predecessors in office were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants did not deprive plaintiff of its property without due process of law, and did not deny to plaintiff the equal protection of law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

VI

The court erred in not finding that the plaintiff is now, and has been ever since the beginning of this action, operating its exchange in the City of Tacoma under a valid franchise contract which prescribed a maximum schedule of rates for both business and residence telephones and which franchise rates, as modified by the orders of the defendants [fol. 442] and their predecessors in office were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants did not deprive plaintiff of its property without due process of law, and did not deny to plaintiff the equal protection of law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

VII

The Court erred in finding that the order of the Board of Public Works referred to in Defendants' Exception No. 33 terminated the franchise contract between the plaintiff and the City of Seattle, for the reason that said order did not attempt in any manner to change the then existing rates.

VIII

The court erred in finding that the order of the Board of Public Works referred to in Defendants' Exception No. 33 terminated the franchise contract between the plaintiff and the City of Tacoma, for the reason that said order did not attempt in any manner to change the then existing rates.

IX

The court erred in holding that Section 10379, of Remington's Compiled Statutes of the State of Washington, authorized the defendants' predecessors in office to terminate the franchise contract existing between plaintiff and the City of Seattle because of an alleged construction of said section by the Supreme Court of the State of Washington [fol. 443] in the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107.

X

The court erred in holding that Section 10379, of Remington's Compiled Statutes of the State of Washington, authorized the defendants' predecessors in office to terminate the franchise contract existing between plaintiff and the City of Tacoma because of an alleged construction of said section by the Supreme Court of the State of Washington in the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107.

XI

The court erred in holding that the alleged construction of said section by the Supreme Court of the State of Washington was binding upon it, and that it did not exercise its independent judgment in construing said section.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants. Thomas J. L. Kennedy, Walter B. Beals, Geo. A. Meagher, of Counsel.

[File endorsement omitted.]

[fol. 444] In United States District Court

Petition for Appeal—Filed August 17, 1926

The above named John C. Denney, as Director of Public Works of Washington, O. O. Calderhead, as Supervisor of Transportation of Washington, and C. Rea Moore, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, feeling themselves aggrieved by the decree entered in the above entitled cause on the 18th day of May, 1926, granting a permanent injunction against these defendants, do hereby appeal from said decree to the Supreme Court of the United States, and prays that this, their appeal, may be allowed and that a transcript of the record and proceedings in said cause and all things concerning the same upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by the said defendants [fol. 445] may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants. Thomas J. Kennedy, Walter B. Beals, Geo. A. Meagher, of Counsel.

[File endorsement omitted.]

[fol. 446] In United States District Court

Order Allowing Appeal—Filed August 17, 1926

It is hereby ordered that the appeal prayed for by the above named defendants in the above entitled cause to the Supreme Court of the United States be, and same is hereby, allowed as prayed.

Done in open court this 17 day of August, 1926.

Frank S. Dietrich, Judge.

[File endorsement omitted.]

[fol. 447] In United States District Court

Order Fixing Bond—Filed August 17, 1926

Upon reading the petition of the above named defendants in the above entitled cause for the allowance of an appeal to the Supreme Court of the United States from the decree rendered in said cause on May 18, 1926, granting a permanent injunction against the defendant, it is

Ordered that the above named defendants execute and file in the office of the Clerk of the above entitled court a bond on appeal, conditioned according to law, in the sum of One Thousand ($1,000.00) Dollars, with good and sufficient surety, to be approved by the undersigned.

Done in open court this 17 day of August, 1926.

Frank S. Dietrich, Judge.

[File endorsement omitted.]

[fols. 448-450] Bond on appeal for $1,000, approved and filed August 17, 1926, omitted in printing.

[fols. 451-453] Citation, in usual form, showing service on Otto B. Rupp et al., filed August 17, 1926, omitted in printing.

[fol. 454] In United States District Court

Statement of Evidence

Excerpts from Testimony

The following from the transcript of testimony taken at the hearing before the master in June, 1925:

From line 7, on page 1908, to line 23 on page 1936, incl.:

Mr. Brodie: If the Master please, in paragraph VI of the answer to the amended and supplemental complaint in

the Pacific Case, reference is made to a certain application by the plaintiff to the Public Service Commission of the State of Washington, accompanied by a certain letter, requesting a continuance in affect of the Burleson rates, and the order of the Department of Public Works made on the 8th day of August 1919, continuing in effect, the Burleson rates; and certified copies of this letter, application, and order, are attached to the original typewritten copy of this answer now in the files of the court; and we will now ask that counsel admit that the letter, application and order were made on the date set forth therein, and that such copies be admitted at this time as exhibits in this case.

Mr. Rupp: That is Exhibit C attached to the answer?

Mr. Brodie: Exhibit C attached to the answer.

Mr. Rupp: I admit, if your honor please, that the application set forth in exhibit C, pages 75 and 76 of the answer to amended and supplemental complaint, was made; and I [fol. 455] admit that the order numbered 3158, which appears at the top of page 77 of that answer was made by the Public Service Commission on the date there set forth. I admit that the letter or document headed "The Pacific Telephone & Telegraph Company, Portland, August 5th, 1919, appearing on page 77 and on page 78 of this answer was filed with the Public Service Commission of Washington. In other words, I admit all of Exhibit C.

The Master: That is all you want, is it not? That includes pages 75, 76, 77, 78 and 79?

Mr. Brodie: That is all.

Mr. Rupp: Yes.

The Master: That is in the joint answer of defendants to the amended and supplemental complaint in the Pacific case.

Mr. Rupp: Yes; in the Pacific case.

Mr. Brodie: Yes.

Mr. Rupp: Now, whether there was any other document filed at that time or not, I am not at this time entirely clear. My recollec is that there was not. If there was, we will show that upon rebuttal.

Mr. Brodie: There is no objection then to that as far as I know. Those are the only ones I know of. Now, in paragraph three, of the affirmative defense in the joint answer of defendants in the Pacific Case, with the paragraph begin-

[fol. 456] ning at page 30, and continuing to page 36, reference is made to ordinance No. 2522 of the City of Tacoma, a copy of which ordinance marked exhibit B is on page 56 of the printed copy of the answer; and to the acceptance of the franchise referred to in that ordinance by Edward E. Webster, and a copy of which acceptance is marked Exhibit B-1, and appears on page 68 of the joint answer, and in said paragraph of the answer, reference is also made to a certain agreement made on the 15th day of January, 1916, between the Sunset Telephone & Telegraph Company and the Pacific Telephone & Telegraph Company, a copy of which agreement appears as Exhibit B-2, on page 69 of the answer; and reference is also made in said paragraph in said answer to ordinance 6319 of the City of Tacoma, a copy of which ordinance appears as exhibit B-3 on page 72 of the printed copy of the answer. Original certified copies of these exhibits are attached to the original typewritten copy of the answer to the amended and supplemental complaint; and I now ask that counsel admit those various ordinances, and the assignment of contracts were made as of the dates and in the manner set forth in the answer and in the exhibit.

Mr. Rupp: I have never checked them up; but subject to some verification upon my part tomorrow, I think there is no question about it at all. I will admit that exhibit B, as set forth in the printed answer, is a copy of ordinance 2522 of the City of Tacoma. I also admit that the ordi- [fol. 457] nance was presented to the mayor on the date set forth on the bottom of page 66, and that what happened thereafter, is set forth on the bottom of page 66 and the top of page 67. I will admit that exhibit B-1 is a copy of a document filed by Edward E. Webster about the date set forth, in exhibit B-1. I will admit that Exhibit B-2 is a copy of the agreement between the Sunset Telephone & Telegraph Company and the Pacific Telephone & Telegraph Company; and I will admit that Exhibit B-3 is a copy of ordinance No. 6319 of the city of Tacoma.

Mr. Brosle: And will you waive the filing of any additional copies of those documents as exhibits?

Mr. Rupp: Yes.

The Master: Now, then, that will be all right. I am just suggesting that if it goes to the Supreme Court on appeal, you may supply them with certified copies.

Mr. Dunbar: There will be no necessity for that. They are now attached to the original answer which is on file in the District Court.

The Master: And that would go up with the record, all of the pleadings.

Mr. Dunbar: Yes.

Mr. Brodie: With that understanding, then, that concludes the presentation of the State's case and the City's case, except with reference to some further stipulation on [fol. 458] the matter of the Seattle franchise.

Mr. Meagher: On page 21 of the affirmative defense of the joint answer to the amended and supplemental complaint, we allege, in paragraph 2 of the answer, that the City of Seattle is a municipal corporation and city of the first class organized and existing under and by virtue of the laws of the State of Washington. I assume that you will admit that.

Mr. Rupp: I will admit that.

Mr. Meagher: On page 22 is a reference to ordinance No. 6498 of the City of Seattle.

Mr. Rupp: Now, Mr. Meagher——

Mr. Meagher: Yes.

Mr. Rupp: Referring back to page 21, in order that there may be no misunderstanding, I am admitting that the City of Seattle is a municipal corporation and City of the first class, and is organized and existing under and by virtue of the laws of the State of Washington; and I will further admit that it has such powers as by law are conferred upon cities of the first class in the State of Washington. I am not necessarily admitting all of the rest of the allegations in paragraph 2; but I am admitting that it has the powers of a corporation of the class it is.

Mr. Meagher: Will you admit the first paragraph of paragraph 2?

Mr. Rupp: No; I would not admit that; but I will admit [fol. 459] that it has such powers as by law are conferred upon it; and the Court, or anyone else passing on it, can tell what its powers are.

Mr. Meagher: Well, I think that is sufficient.

Mr. Rupp: I think that is all you want.

The Master: I think that the rest of it would be a matter of argument on the law.

Mr. Rupp: Yes; that is discernible from the statutes themselves.

Mr. Meagher: I desire now to offer in evidence, Defendants' Exhibit 27, which is the ordinance referred to on page 22 of the affirmative defense in the answer of the defendants.

Mr. Rupp: I will admit, Mr. Meagher, that this is a copy of the ordinance No. 6498.

Document described received in evidence and marked Defendants' Exhibit 27 Pacific Case.

Mr. Meagher: I desire to offer in evidence the acceptance of the franchise which is contained in ordinance No. 6498, which has been referred to here as Defendants' Exhibit 27.

Mr. Rupp: Is that contained in here?

Mr. Meagher: Yes; it appears on page 23, but it is not set forth, in the exhibit.

Mr. Rupp: It is not set forth in the exhibit?

Mr. Meagher: No.

Mr. Rupp: I have never seen this document before at any time.

Mr. Meagher: Well, I will tell you what it is, and I think then you will have no objection. It is just the acceptance by John S. McGroarty and George C. Blankner of the franchise contained in ordinance 6498; and nothing else.

Document described received in evidence and marked Defendants' Exhibit 28 Pacific Case.

[fol. 460] Mr. Rupp: I fail to see how either the ordinances of the City of Tacoma, which have been put in evidence, or this ordinance, or any of the things pleaded as affirmative matter in the answer to the amended and supplemental complaint are material; and I object to them on that ground; and I take it that it may be understood that my objection runs to all of this.

Mr. Brodie: Yes; and inasmuch as that involves a question of law, we will reserve argument upon it until later.

The Master. Yes. The objection may be overruled. But I assume that you have no objection to announcing your purpose of offering them in evidence.

Mr. Meagher: No; but I thought at this time we would not argue this particular question.

The Master: No; I am just asking you for a statement of your purpose.

MR. Meagher: The purpose of this, and I can state it succinctly, and briefly, the position of defendants with reference to the Pacific company regarding this particular franchise, which I offer here in evidence, is as follows. This franchise, by various mesne conveyances was finally owned by the plaintiff, Pacific Telephone & Telegraph Company of Seattle. It was subsequently purchased with the property of the Independant Company; that is, the Independent telephone property, by the Pacific Telephone & Telegraph Company, or some of its predecessors in interest. This ordinance has not terminated as yet. There is another franchise ordinance which, I think, Mr. Rupp will put in evidence. He said something about it sometime ago. Regarding the franchise granted by the City of Seattle to the [fol. 461] predecessor of the Pacific Telephone & Telegraph Company, I think it was the Sunset franchise, or some franchise assigned to the Sunset Company. That franchise has terminated. Our position is that the only valid subsisting franchise under which the company is operating at the present time is this particular franchise which I have offered in evidence. In 1911, the Independent Company—and if I do not state this correctly, Mr. Rupp, I wish you would correct me—the Sunset Company, I think that was the company, made an application to the public Service Commission, which was then the Railroad Commission, I think in 1911 for a raise in telephone rates.

Mr. Rupp: I think you are wrong about that, in 1911?

Mr. Meagher: Yes.

Mr. Rupp: I think the Independent Company, sometime prior to 1911 made an application to the regulatory body of the state, the name of which I think at that time was the Railroad Commission of the state of Washington for an increase in rates, and your Honor is familiar with that case because it was the source of the controversy which finally went to the Supreme Court of the State of Washington and resulted in an opinion entitled——

Mr. Meagher: Webster.

Mr. Rupp: (continuing): Webster.

Mr. Meagher: Versus the city of Seattle.

Mr. Rupp: Versus the city of Seattle, and is about what volume?

Mr. Meagher: About the 56th, I should think, somewhere along there.

Mr. Rupp: We will furnish you the volume and page.

[fol. 462] Mr. Meagher: Yes.

Mr. Rupp: I came to Seattle in 1909. I had nothing to do with the telephone business until 1911. It is my recollection, however, that neither the Sunset Company nor the Pacific Company had any application pending at that time for any raise in rates.

Mr. Meagher: I understood that there was a joint hearing in reference to both companies.

Mr. Rupp: No.

Mr. Meagher: I may be wrong as to that, but it does not make any difference——

Mr. Rupp: I have the records.

Mr. Meagher (continuing): —for the purpose of this statement.

The Master: That is a matter that may easily be adjusted.

Mr. Rupp: I have the record in these cases. MacDougal Southwick Company started a suit before the Railroad Commission, against the Independent Company, and everybody else, but it was all over the Independent Company rates.

The Master: I remember.

Mr. Meagher: Subsequently thereto, I think in 1915—in 1911 the franchise rates were raised—I am referring now to the Independent Telephone Company's franchise—were raised and later on, I think in 1916, there was another application and another hearing and they were again raised. In July——

Mr. Rupp: Do you want me to say what the fact is about that?

Mr. Meagher: Yes, go ahead.

Mr. Rupp: That is, I think, incorrect. The date of the order of the Railroad Commission relative to the franchise [fol. 463] rates of the old Independent Company I do not exactly remember, but I think he is not far wrong—about 1911.

Sometime I think about the year 1914 or 1915 the Public Service Commission, which was the successor of the Railroad Commission of the State of Washington, instituted a

suit before itself, complaining of the rates of the Pacific Telephone and Telegraph Company, and after a long and extensive hearing, it issued a valuation order, which was placed in evidence this morning by Mr. Brodie, Defendants' Exhibit No. 12, and it also issued a rate order, which has not yet been placed in evidence, and it was dated, I think, August 25, 1916.

Mr. Meagher: That is correct. As to whether the Company made application or as to whether the Commission on its own order held the hearing, I don't think is materia-; as to the point I am making. I am not so familiar with those entries and dates as Mr. Rupp.

The Master: So that the rate that was put into effect continued in effect by the order?

Mr. Rupp: No.

Mr. Meagher: No.

Mr. Rupp: No sir. I will state briefly what happened at that time. The Commission filed its complaint. Your Honor has heard the testimony. An inventory of this property was made and an appraisal was made, which resulted in this valuation order. They then issued this rate order. The rate order did not change any rates that had been [fol. 464] theretofore in effect, except that it directed the Company to abolish some obsolete rates which were discriminatory rates, and I will put in that report or rate order.

The Master: All right.

Mr. Meagher: July 31, 1918, I think I am correct as to that date—that was the date that the Postmaster General took over the telephone lines of the country—after he had authority, which was granted to him by Congress during war times, he made a raise in rates throughout the country. The year following that the telephone systems were then turned back to the various companies throughout the United States. I think it was a year to a day, wasn't it Mr. Rupp?

Mr. Rupp. They supposedly took charge at midnight July 31, 1918, and released control July 31, 1919.

The Master: And midnight August 1st.

Mr. Rupp: Yes. The Act of Congress, however, made some provision with reference to rates for a period of time subsequent.

The Master: Four months, wasn't it?

Mr. Rupp: Yes, for a four months period subsequent to that time.

The Master: Unless previously changed, wasn't it?

Mr. Rupp: Unless previously changed.

The Master: By the regulatory body.

Mr. Rupp: Yes. I am not quite sure that Mr. Meagher is right that he raised all of the rates in the country, but [fol. 465] there was a raise in the State of Washington.

Mr. Meagher: There was a raise so far as the Pacific Company was concerned.

Mr. Rupp: And there was generally throughout the country, but not necessarily everybody.

Mr. Meagher: The Commission, during the time that the government had control of the telephone lines, endeavored to put in effect an order establishing the rates as fixed by the Post-Master General. That matter was taken through the Courts and it was held that the Commission had no power, as the United States had complete control.

When the Pacific Telephone and Telegraph System was turned back by the government to the Pacific Company, the Pacific Company—and if I am not correct as to this I wish to be corrected by you, Mr. Rupp—by letter, I think, or application——

Mr. Rupp: Yes, as I understand you are not exactly bound by anything that you say here, anyway, to this extent, you are not offering testimony, you are simply telling the Court, for his own information, what he wants to know about this.

Mr. Meagher: Yes.

The Master: I am trying to get from him the purpose of the offer.

Mr. Rupp: Yes, that is right.

[fol. 466] Mr. Meagher: I am going to do that.

Mr. Rupp: So, if he is incorrect about something or other, I am not going to try to——

The Master: I will give you a chance to correct it.

Mr. Meagher: The company or the Commission or the regulatory body, without any public hearing, without giving notice of any hearing to any of the municipalities, continued in effect the rates that were put into effect by the Post-master General, and those rates continued in effect from

that time on until the application was made in 1922 by the Pacific Company and the Home Company. From that application the Court will take notice of what happened since that time, because that is the matter which is in controversy here at the present time.

The point we make is this, that by reason of the fact, if our contention is true, that the only franchise under which the Pacific Company could legally operate in the city of Seattle is the Independent franchise, by reason of the fact that that franchise prescribes rates which had been modified in 1911 and 1916 by the regulatory body of the state of Washington, that the franchise provision as to rates rather than being terminated or cancelled has been in effect modified, and, consequently, there could be no confisca- [fol. 467] tion, for the reason that there is a contractual relation still existing between the city of Seattle in this franchise and the successors to the Independent Telephone Company. Have I made myself clear?

The Master: Yes.

Mr. Meagher: That is a question which will be later argued.

The Master: All right.

Mr. Meagher: I wish to offer in evidence—and I am just following out our allegations in the affirmative defense—this is referred to on page 22, and is Ordinance No. 7143, which amends Ordinance 6498, which is known as Defendant's Exhibit No. 27. I will offer this in evidence as Exhibit 29.

Mr. Rupp. This is all going in under my objection.

Mr. Meagher: Absolutely, Mr. Rupp. That is understood.

(Document referred to was admitted in evidence and marked Defendants' Exhibit 29, Pacific Company case.)

Mr. Meagher: At the bottom of page 23 we have alleged that the grantees thereof—that is referring to this particular franchise—by certain sundry mesne conveyances within the knowledge and possession of the plaintiff but not of the defendants, transferred and assigned said franchise and the property held thereunder to the plaintiff. The [fol. 468] Pacific Telephone and Telegaph Company——

The Master: What does the language mean, what does that sundry "Means", for instance, mean? The use of "means" there I do not get at all. Does that mean sundry mesne conveyances?

Mr. Rupp: As a matter of fact, it is mispelled in here, I think.

Mr. Meagher: Yes, "mesne."

The Master: It means sundry mesne conveyances?

Mr. Rupp: Yes.

Mr. Meagher: That is what it means. Now, Mr. Rupp, you will stipulate for the purpose of the record, that the Pacific Telephone and Telegraph Company became the legal owner of this franchise in question, there is no question about that.

Mr. Rupp: Yes.

The Master: Which one are you referring to now.

Mr. Meagher: I am referring to the Independent Companies franchise.

The Master: All right.

Mr. Meagher: And also the property of the Independent Telephone Company.

Mr. Rupp: No, Mr. Meagher. I don't know that I can entirely stipulate to that.

Mr. Meagher: Well, what will you stipulate to, and maybe we can get together?

Mr. Rupp: The trouble is that you are using the word "property" there; that is perhaps embracing property [fol. 469] that we did not get.

Mr. Meagher: Well, I mean the telephone system and this franchise.

Mr. Rupp: I have in the files, and I will produce a deed to certain of the real estate that we acquired from the Independent Company, and a bill of sale of the property that we acquired of the Independent Telephone Company, and if that is satisfactory to you I will give you that, because that is what we got.

Mr. Meagher: Yes.

Mr. Rupp: And the property we did get is described in there. The old Independent Telephone Company may have had a great deal of property that we did not acquire, I don't know.

Mr. Meagher: Didn't you acquire everything that was used or useful——

Mr. Rupp: I can't exactly say, but, for the sake of your argument, we did acquire operating telephone property in the city of Seattle and I think substantially all of that operating telephone company property.

Mr. Meagher: Well, I think that is sufficient. On May 3rd, 1923, the Pacific Telephone and Telegraph Company granted, by instrument in writing, to F. H. Crosby, of San Francisco, California, as party of the second part, this franchise. I have a certified copy of this instrument, which I will offer in evidence as Defendants' Exhibit No. 30. And, by the way, the Court will notice that this transfer [fol. 470] as made after this hearing before the Public Service Commission, as the date will indicate in the assignment.

The Master: I suppose the exhibit should indicate when it was made there.

Mr. Meagher: I will ask Mr. Rupp at this time if there is any book account which would show the consideration or receipt of consideration from F. H. Crosby to the Pacific Company by reason of this sale of this franchise.

Mr. Rupp: I have not any knowledge on the subject.

Mr. Meagher: You have no knowledge. You have no knowledge of your own what was the actual consideration?

Mr. Rupp: The knowledge of that would be obtained, I presume, from the company's books kept in San Francisco, which are not kept in the state of Washington.

Mr. Meagher: I would like to put Mr. Fleager on the stand at this time. Swear Mr. Fleager.

[fol. 471] C. E. Fleager, being recalled as a witness on behalf of defendants, testified as follows:

Mr. Meagher:

Q. Mr. Fleager, you are assistant vice President of the Pacific Telephone and Telegraph Company?

A. Yes sir.

Q. Are you familiar with the assignment that I have referred to, from the Pacific Telephone and Telegraph Company to Crosby?

A. Well, nothing more than what I have heard here and similar reference to it along that way. I know nothing of the details of it at all.

Q. Do you know anything about the consideration?
A. I do not.

Mr. Rupp: I may say to you Mr. Meagher, that there is not anybody here, nor has there been any body here, so far as I know, with the possible exception of Mr. Pillsbury and Mr. McFarland, who had any knowledge or responsibility in connection with that matter.

Mr. Meagher: I expected to ask this question of Mr. McFarland. I thought probably he would know. It is information that we have not got.

Mr. Meagher:

Q. Who is Mr. Crosby, if you know, Mr. Fleager?
A. He is an individual. I think he resides somewhere around San Francisco. I have seen him a number of times.
Q. Has he any connection with the Pacific Telephone and Telegraph Company?
[fol. 472] A. No official connection that I know of.
Q. Has he had any official connection in the past?
A. As I understand, Mr. Crosby, he is an owner and operator of what you might call independent telephone companies.
Q. Where?
A. Well, he was interested in the Santa Paula Company, at Santa Paula, California, at one time. I think he was interested in the Northwestern Long Distance up here at one time. I really don't know the details. It is just general knowledge that he has been interested in those things from time to time. What the details are I don't know.

Mr. Rupp: I can add to that, Mr. Meagher, that I know personally that Mr. Crosby had some considerably connection with the Northwestern Independent Telephone Company. I have seen him on the streets of the city of Seattle. I do not know him personally, but I know that he had considerable to do with the Northwestern Independent Telephone, which operate toll lines running from at least as far as Port Angeles down to Roseburg, Oregon, and was a competitor of the Pacific Telephone and Telegraph Company throughout that territory. And I may add that the way I know that is that I represented the company at hearings before the Public Service Commission when the relations be-

tween the Northwestern Independent Company and the Pacific Company were involved, and where they had sought [fol. 473] to compel us to adopt certain practices with reference to the routing of toll messages. And I may add, on top of that, that I also know that there was a decree entered by the Federal Court for the District of Oregon, providing that any person calling—which you remember yourself—that any person desiring to talk over long distance must indicate to the operator over what line he intended to talk, and that regulation was in force under that decree, in this city, for many, many years; and Mr. Crosby was connected with that company.

Mr. Meagher:

Q. In any event, Mr. Crosby, since the assignment of this franchise, has not operated a telephone company within the confines of the city of Seattle? You know that to be a fact, don't you, Mr. Fleager?

A. No, I don't.

Mr. Rupp: I will admit that that is a fact.

Mr. Meagher: You will admit that this is the fact?

Mr. Rupp: Yes.

Mr. Meagher:

Q. Mr. Fleager, can you obtain for the defendants the information regarding the actual consideration paid, if any, for that franchise, between the Pacific Company and F. H. Crosby?

A. Well, all I could do is that I can make a search of their records in San Francisco. You ask me whether I can. I know nothing about it, so I can say nothing as to whether I can or cannot. I can make a search, that is all I could do.

Mr. Rupp: I do not think you are under any obligation [fol. 474] to make a search for the other side.

Mr. Meagher: I don't think you are, either. We could get our information by interrogatories, I presume, if we applied for them in time.

Mr. Rupp: It seems to be a little late.

Mr. Meagher: Maybe we are.

Mr. Meagher:

Q. In computing the assets of the Pacific Telephone and Telegraph Company in the state of Washington for 1923, was any asset included by reason of any consideration paid by F. H. Crosby to the Pacific Telephone Company by reason of this assignment of this franchise—do you know that?

[fol. 475] A. No. I don't know anything about it. I did not consciously take it into account, as far as anything I have done.

Mr. Rupp: That would not appear anyway. The testimony of these gentlemen, first, as to the cost of the property, and secondly, as to the reproduction cost of the property—those figures are obtained, so far as the book costs of the property are concerned, from the General Auditor.

Mr. Meagher: It would appear, however, in showing the annual earnings of the company, with reference to the sale of any of its property, just the same as a salvage item.

Mr. Rupp: It might so appear.

The Witness: Well, Mr. Meagher, on that, if such an item as that was sold, it might depend upon how the company classified it; if they classified it as miscellaneous investment, it would be in that account, but I have not concerned myself with that account particularly at all because it has not been operative property.

Q. You, at least, have not given it any consideration?

A. No, I have not.

Q. That item would not appear in any books that are within the City of Seattle at the present time, belonging to the Pacific Company?

A. No, sir.

Mr. Meagher: I think that is all.

[fol. 476] (No Cross-examination.)

(Witness excused.)

Mr. Meagher: Did you offer in evidence, Mr. Brodie, the cause No. 31 of the Public Service Commission?

Mr. Brodie: No.

Mr. Meagher: These are the rates that were put into effect in 1911.

The Master: Is this an order of the Public Service Commission?

Mr. Meagher: Yes, findings of fact, conclusions and order, and they are referred to on page 25 at the top of the page — Cause No. 31. That was the first order by the Public Service Commission changing franchise rates expressed in the franchise which were offered in evidence.

Mr. Rupp: There is no objection except the general one.

(Document referred to was admitted in evidence and marked Defendant's Exhibit "31" Pacific Company Case.)

Mr. Meagher: I wish to offer in evidence an order made by the Commission, dated August 5th, 1916. That was the second hearing held by the Commission, under cause No. 1825.

Mr. Rupp: Just a minute about this.

The Master: Is this one you are now offering as re- [fol. 477] ported in the reports of the Public Service Commission?

Mr. Rupp: No, I will tell you what I think this is.

Mr. Meagher: That is insofar as the city of Seattle is concerned.

Mr. Rupp: What I think this is, is this: that on August 5, 1916, as I have heretofore stated, the Public Service Commission of the State of Washington, made a rate order and continued substantially in effect all the rates that had been in except certain obsolete rates which it required us to remove, upon the ground that those rates were discriminatory, and which, I may add we were glad to do, because of the fact that those obsolete rates were lower than the rates that we had theretofore been charging. As you yourself will remember, we had attempted to standardize the rates at an earlier date, but we had an agreement with the City of Seattle that as long as a man kept the same equipment that he did have his rates should not be brought up to the standard, but that if he had any additional equipment put in, or any change in equipment, that then he must be brought up to the standard; and this, I think, was for the purpose of putting those people who had those earlier rates upon the same basis as everybody else, and that this [fol. 478] was the rate schedule applicable to Seattle thereafter, bringing those people all into line.

The Master: If that was up there in the orders of the Commission, it could be verified, we could check it over, and, if it is not right Mr. Meagher will make it right.

Mr. Rupp: This is not the order of the Commission.

The Master: Oh.

Mr. Rupp: These are copies of certain schedules, apparently, that were filed subsequent to that order, by the Company. Whether they are all the rates or not, I do not know.

Mr. Meagher: Turning to page 38 of the——

Mr. Rupp: You do not mean this is a certified copy of order 1825.

Mr. Meager: No, let me read it.

The Master: I am trying to find out if the whole thing——

Mr. Rupp: Oh, no.

Mr. Meagher: The certificate is as follows (Reading certificate):

Mr. Rupp: That is, those are certain rate sheets that were taken out of a portion of the schedule of rates on file. They are not by any means, of course, all the rates.

Mr. Meagher: I think the certificate speaks for itself.

Mr. Rupp: Yes.

[fol. 479] (The document referred to was admitted in evidence and marked Defendants' Exhibit "32", Pacific Company case.)

Mr. Meagher: On Page 38, which is the defendant's exhibit "A," I understand that, Mr. Rupp, to be the rate fixed in cause No. 1825, that became effective September 1st, 1916.

The Court: You are referring to exhibit "A," at page 38?

Mr. Meagher: Yes.

Mr. Rupp: Well, that is a portion of these rates that you have just put in under this document. All I am attempting to say, if Your Honor please is that I am not questioning that these are a part of the schedules of rates that were filed by us in compliance with the order in cause No. 1825. What I am saying is that that is not the entire schedule of rates, even applicable to the city of Seattle; but, insofar as it goes, I make no question but that it is a copy of those rates.

Mr. Meagher: At pages 38 and 39, does that includes all the rates applicable to the city of Seattle?

Mr. Rupp: No.

Mr. Meagher: What will you agree to as to what is shown there?

Mr. Rupp: I will agree, Mr. Meagher, that these are cor-
[fol. 480] rect copies of the rates for the class of service therein denominated.

Mr. Meagher: Pursuant to order of the commission made that date?

Mr. Rupp: In compliance with the order of the commission in cause No. 1825, and the date is, I think, August 5, 1916, or April 5th, 1916.

The Master: That is the Commission number of cause?

Mr. Rupp: The Commission number. The Commission made an order.

The Master: Yes.

Mr. Rupp: And told us to put in effect certain rates, those two pages I think are copies of a portion of the rates that we filed in compliance with that order. I don't think Mr. Meagher and I have any controversy about it. I think he misunderstands the scope of a schedule of rates, because there is a great deal more in any schedule of rates ordinarily, than these four or five typewritten pages.

The Master: Even as applied to Seattle?

Mr. Rupp: Yes.

Mr. Meagher: That is all I have to offer in evidence. I think Mr. Beals wishes to put in something.

Mr. Brodie: In order to complete the record, Mr. Rupp, in reference to Section 3 of the affirmative defense of defendant, in the answer, you will admit, I assume, that the
[fol. 481] City of Tacoma is a municipal corporation——

Mr. Rupp: —of the class set forth in paragraph 3 of the affirmative defense of the joint answer of the defendants in this cause.

Mr. Brodie: And that it has such powers with reference to telephone franchises and the like as——

Mr. Rupp: —as the law may have conferred upon it, yes sir.

Mr. Brodie: That is all.

The Master: The law, in that sense, would include the constitution and the law, of course.

Mr. Rupp: Whatever Your Honor would, under the law, be entitled to take into consideration, which is the common law and the statutes of the State of Washington.

The Master: All right.

Mr. Rupp: I disagree very much with these gentlemen as to what the statutes of the State of Washington may mean.

The Master: Yes. That leaves it open for argument. I am not asking you to admit that.

(Ending at line 23 on p. 1936.)

[fol. 482] From line 20 on page 1937 to end of page 1938, incl.:

Mr. Meagher: I wish to offer this certified copy of the proceedings had in 1919 in reference to the Burleson rates. It is a letter from the Company.

Mr. Rupp: I will admit that the documents set forth herein are on file with the Public Service Commission and are dated as of the dates set forth therein, and were filed as of the dates set forth therein.

Mr. Meagher: Then, so that The Master can have that in the record, I will offer it.

[fol. 483] (The document referred to was admitted in evidence and marked Defendants' Exhibit No. 33, Pacific Company case.)

(Recess.)

[fol. 484] From line 26 on page 1939 to line 4 on page 1944, incl.:

Clark R. Jackson, a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Beals:

[fol. 485] Q. State your full name?

A. Clark R. Jackson.

Q. What position do you hold?

A. I am Superintendent of Public Utilities of the City of Seattle.

Q. How long have you held that position?

A. About a year and nine months, or eight months.

Q. As such Superintendent of Public Utilities, is it your duty to check up the public service corporations operating in the City of Seattle?

A. Yes; all companies having franchises in the City of Seattle.

The Master: Check them up in what way. Their performances?

A. All work they desire to do in the city must be done upon an application to the department; we handle all complaints of customers, and matters of that kind.

Q. Is one F. H. Crosby operating and conducting any telephone business in the City of Seattle?

A. Not to my knowledge; if he is, it is not lawful, I don't know of any of his operations.

Q. Are you acquainted with any telephone facilities owned by F. H. Crosby in the City of Settle?

A. I am not.

Q. Are you acquainted with the service being furnished in the City of Seattle by the plaintiff company, the Pacific Telephone & Telegraph Company?

A. I am to a great extent.

Q. Do you know whether or not that plaintiff company is furnishing the City of Seattle any free service?

A. It is.

[fol. 486] Q. According to the terms of what contract, do you know?

A. They are furnishing services to the City of Seattle according to the terms of the Sunset franchise, and according to the terms of the Home franchise which would be approximately the service prescribed, although I am not positive.

Q. When you say the "Home franchise" you mean what is commonly known as the Independent Company franchise?

A. Yes.

Q. Granted to McGrorty & Blankner?

A. Yes.

Mr. Beals: That is all.

Cross examination.

By Mr. Rupp:

Q. The Pacific Company franchise expired on July 20, 1923, or the franchise, I may say, that was originally granted to the Sunset Telephone & Telegraph Company?

A. Yes.

Q. All of the services which were required to be furnished by that franchise, have been furnished to the City of Seattle since the expiration of that franchise?

A. The service has been furnished, yes.

Q. Well, it is exactly the same thing as the City of Seattle has been receiving all of the time?

A. Do you mean the services furnished to the City of Seattle itself?

Q. Yes; the services which the city has received.

A. Practically the same.

Q. It is the same amount of free service that the city [fol. 487] has received for many years?

A. Yes; it is just the same.

Q. All properties placed in the streets of the City of Seattle, must be placed there under a permit from your office, must it not?

A. A permit from the Board of Public Works; although the application is made through our office.

Q. You are a member of the Board of Public Works?

A. Yes.

Q. Of the City of Seattle?

A. Yes.

Q. Let me ask you for my own information, do you remember the number of the ordinance which requires that all public utility companies, or any person, placing poles, or like apparatus in the streets, must secure a permit from the City of Seattle?

Mr. Beals: I object to that, if the Master please, as not proper cross examination.

Mr. Rupp: Well, I am not trying to cross examine him on that at all. I am simply asking for my own personal information.

The Master: He has stated that he wants it for his information.

A. Ordinance No. 38045.

Q. That is the one that Mr. Meagher gave?

A. That is the ordinance covering the use of the public streets of all kinds and descriptions; and in that ordinance provision in regard to the companies operating under the franchise doing work, are given permits under that ordinance.

[fol. 488] The Master: Anybody regardless?

The Witness: It is a large ordinance covering every use of the streets by anybody; and a part of it refers to corporations, public utility corporations.

(Witness excused.)

Mr. Meacher: There is one more exhibit here that I have found, another certified copy, and I want to offer it in evidence, showing what the rates were in the regime of the Postmaster General, the Burleson rates.

Mr. Rupp: Well, I will admit ——

Mr. Meagher: I did not think you would have any objections.

Mr. Rupp: I think these are a portion of the rate sheets which were filed with the Public Service Commission by the Pacific Telephone & Telegraph Company at the time that the Postmaster General raised the rates that had theretofore been in effect in the State of Washington. I am not admitting, of course, that these are the entire schedules; but insofar as they are applicable to the classes of services enumerated therein, they are correct. At least, I think they are. I never checked them.

The Master: Mr. Meagher says that that is a certified copy. Mr. Rupp says that he has never checked them.

Mr. Meacher: That is a certified copy.

[fol. 489] The Master: It may be received in evidence.

Document described received in evidence and marked Defendants' Exhibit 35, Pacific Case.

[fol. 490] From line 13 on page 2037 to line 12 on page 2039, incl.:

(Document referred to admitted in evidence and marked Pacific Exhibit 100 and Home Exhibit 85.)

Mr. Rupp: I now offer in evidence, if Your Honor please, a copy of ordinance No. 4985 of the ordinances of the city of Seattle. This is not certified to, Mr. Meagher, but this is the one that we agreed to.

Mr. Meagher: What is that about?

Mr. Rupp: That is the Sunset Telephone and Telegraph Company franchise here which expired in July, 1923. I asked you to admit, Mr. Meagher, and I will say to you now that it is the fact, that on January 2nd, 1907, the property of the Sunset Telephone and Telegraph Company, including the franchise ordinance just introduced in evidence, was leased to the Pacific Telephone and Telegraph Company and that on January 8th, 1917, the property of the Sunset Telephone and Telegraph Company, including that [fol. 491] franchise, was transferred to the Pacific Telephone and Telegraph Company.

Mr. Meagher: What is the last date?

Mr. Rupp: January 8, 1917. I will state to you, Mr. Meagher, that the Pacific Telephone and Telegraph Company was not an owning company, but an operating company and the property of the Sunset Company was leased to the Pacific Company and operated by the Pacific Company under a lease until the 8th day of January, 1917, when the property was sold by the Sunset Company to the Pacific Company. It has been known in this city throughout as the Pacific Telephone and Telegraph Company.

Mr. Meagher: We will stipulate that that is a fact upon the word of Mr. Rupp.

(Document last referred to admitted in evidence and marked Pacific Company Exhibit 101 and Home Company Exhibit 86.)

Mr. Rupp: I offer in evidence, if Your Honor please, resolution No. 7495 of the city Council of the city of Seattle, dated August 13th, 1923, which resolution is certified and of which I have no copy, but will supply one for your Honor. That is the resolution, Mr. Meagher, which the Council passed saying that they would not consider the application of the Pacific Telephone and Telegraph Company for a new franchise until we dismissed this pending litigation. [fol. 492] Mr. Beals: What is the number?

Mr. Rupp: 7495.

Mr. Meagher: I can't see the materialty of this last resolution as far as this case is concerned.

The Master: I am going to overrule the objection. If we find it is not——

Mr. Meagher: I think it is immaterial. I make no objection to it.

(Document referred to admitted in evidence and marked Pacific Company Exhibit 102.)

[fol. 493] PLAINTIFF'S EXHIBIT NO. 109

BEFORE THE PUBLIC SERVICE COMMISSION OF WASHINGTON

No. 1825

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Opinion and Findings of Fact

The taking of testimony in this cause was concluded at a hearing in Olympia, Washington, beginning May 31, 1916, at 11:00 o'clock A. M., there being present Chairman C. A. Reynolds, Commissioners A. A. Lewis and Frank R. Spinning and Assistant Attorney General Scott Z. Henderson. The defendant company was represented by Mr. James T. Shaw, Mr. H. D. Pillsbury and Mr. Otto B. Rupp, its attorneys. The City of Seattle was represented by Walter F. Meier, Assistant Corporation Counsel, its attorney; the Traffic and Transportation Bureau of the City of Tacoma by Mr. Jay W. McCune, its attorney and the Town of Cosmopolis by W. H. Tucker, its attorney, and testimony having been adduced by the respective parties, said cause was taken under advisement; that while the cause was under advisement, Commissioner Reynolds resigned and E. F. Blaine was appointed in his stead, who, since his appoint-

ment has taken part in the deliberations of the Commission in this action.

The Public Service Commission in the opinion and findings of fact rendered in Case No. 1810, under date of April 25, 1916, found as follows:

"That the fair value of respondent's entire property or rate base from which should be estimated the just, fair and reasonable and sufficient return to respondent as of December 31, 1914, is the sum of $19,382,269.00. Rates will [fol. 494] be determined from this sum or such part thereof as is used for public convenience at the date of establishing just, fair and sufficient rates."

Testimony was offered and exhibits submitted in evidence, not only upon the segregation of the fair value already found by the Commission in Case No. 1810, but, also upon the questions of plant not used and useful, the credit to exchanges from toll revenues for the use of the exchange plant in rendering toll service, the earnings and expenses of the different exchanges and the toll lines, the basis of primary rate areas, obsolete rates, operation of air line toll rates, and other questions arising from the rules and practices, of respondent company, all of which will be taken up and considered in order.

In relation to the segregation of the valuation the commission's engineers submitted an exhibit (Comm. Ex. 1, Trans., p. 14) prepared by them, which shows the segregated valuation of the various exchanges of the respondent company in the state of Washington and bases the valuation of the various exchanges upon the valuation found by the commission following the valuation hearing. The respondent presented no segregation either through testimony or exhibits that in any way questioned the fairness or reasonableness of the segregation made by the commission's engineers, and the commission therefore feels fully justified in accepting the segregation as offered.

The respondent has plant not classed as used and useful to the amount of $208,858.56 (Res. Ex. 10, Trans., p. 274) which will be deducted from the fair value.

The service rendered by the telephone company is of two general types commonly termed exchange, and interexchange or toll, and this distinction gives rise to the segre-

gation of the plant into portions devoted to these particular uses and known as exchanges and toll lines. Evidently, then, the use is one basis for the division of the plant into exchanges, commonly coincident with the cities or towns and contiguous territory, and toll lines, which extend between these exchanges. Such a division of physical property is one generally recognized and the Interstate Commerce Commission has so recognized it in its prescribed system of accounts. For practical purposes, convenience in operation, accounting and such, these toll lines are com- [fol. 495] monly considered as extending from a central office in one exchange to a central office in another exchange, and to constitute the toll plant. While the exchange plant is complete within itself and can render service, this is not true of the toll plant and no toll service can be rendered without some use being made of the exchange plant. It follows, therefore, that not only must the plant commonly recognized as toll plant be taken into consideration in the determination of a basis against which the earnings and expenses from this type of service is set, but something else in addition. On the basis of use an attempted segregation of all portions of the exchanges between exchange and toll would lead to practically insurmountable difficulties. Consequently, it has been customary to determine the expense incurred by the exchange plant in the function it performs in rendering toll service, and by crediting to the earnings of the exchange a portion of the toll revenues, to compensate therefor, thus fully recognizing that this expense belongs and must appear in the toll rates and is justly assessable against the toll user.

Respondent's Exhibit 2 (Trans., p. 218) shows a detail computation for the determination of the compensation to exchanges for interexchange or toll function. This computation based upon the year 1914 shows that for that year a credit of 32.95 per cent. of the gross revenue of the toll should be credited to the exchange. Computations by the commission's engineers for this same year, using their slightly different views as to the distribution of some of the items of expense, resulted in the finding of 32.06 per cent., or practically the same amount (Trans., p. 229).

Analysis of the toll revenues over the period from 1911 to 1914, inclusive, which period covers fluctuating business conditions, shows that the 1914 revenues did not include the average potential in the business as indicated by the period, and that the interexchange expense for the year 1914, assuming the business had included the potential of the other years of this period, would have resulted in an allowance or compensation to the exchanges of 30.36 per cent. of the total interexchange revenue for the state.

The earnings and operating expenses of the respondent company have been thoroughly investigated in detail for [fol. 496] the years 1913 and 1914, both for exchange and interexchange or toll plant, and also for the plant as a whole. The respondent's exhibit No. 3, which corresponds to the "statement of earnings and expenses set against segregated rate base" as shown in the Commission's Exhibit 2, shows the distribution of the plant, gross revenue, expenses and net revenue within the state. Thirteen exchanges, Aberdeen and Hoquiam being considered as one, comprise 76.35%, the remaining exchanges, all of which have a fair value of less than $50,000, each, comprise 3.86% and the toll lines comprise 19.79% of the total property within the state. The following tabulation is taken from that exhibit:

Exchange	Rate base	Revenue	Expenses	Revenue	Per cent net return	Per cent net return—published rates substituted for obsolete rates
Seattle	$9,710,502	$1,630,724	$1,450,538	$180,186	2.65	3.35
Spokane	3,387,264	652,769	602,415	50,354	1.49	1.81
Tacoma	2,425,826	424,546	440,977	16,431*	.68*	.23*
Bellingham	607,370	86,491	112,461	15,970*	2.63*	2.62*
Aberdeen and Hoquiam	310,825	82,023	70,446	11,577	3.73	4.03
Walla Walla	303,000	87,556	60,807	26,658	6.80	7.96
Everett	298,212	62,573	66,207	3,634*	1.22*	1.01*
North Yakima	291,412	75,965	61,374	14,589	5.01	5.06
Vancouver	140,648	33,532	34,174	642*	.46*	.62
Olympia	110,170	36,945	33,411	3,533	3.21	3.39
Centralia	72,446	31,200	25,071	6,189	8.54	9.18
Colfax	50,522	20,248	18,596	1,652	3.27	5.17
Exc. having Rate Base of less than $50,000	747,871	214,504	271,266	56,661*	7.58*	7.27*
Toll Lines	3,836,133	645,392	379,008	266,383	7.20	....
State Totals	$19,282,249	$4,103,732	$3,641,847	$461,885	2.38	2.79

* Indicates loss.

[fol. 498] The net result of operation either under the straight line or sinking fund method of calculating depreciation expense for the years 1913 and 1914, is shown in Commission's Exhibit 2, and in neither case is the net return or earning either for the exchanges as a whole or any particular exchange excessive. The only exchanges showing an earning in excess of eight per cent are Centralia and Hoquiam, and with respect to Centralia this is because all toll earnings of Chehalis and certain other surrounding towns are handled by and credited to Centralia, while Hoquiam is the result of the present plant being fully saturated; that is, at its highest point of development, and is at present inadequate, and must immediately be provided with new, more efficient and additional construction and equipment.

Thus it is apparent that the aggregate earnings on exchanges are not excessive and in no particular exchange is the rate of return excessive, and that no radical rate changes are reasonable or advisable.

The exchange rate schedules from which these earnings have resulted have been those which the company itself determined. It is a reasonable assumption that they have named rates therein that they felt would sell the service and encourage development. To show an adequate return upon the investment at the present time it is manifest that these rates in the aggregate would have to be raised. It is the belief of the commission that the company would not name rates which would fail to show earnings unless they felt that they could not exact higher rates without restricting development. Consequently, as these rates, in the aggregate do not show a reasonable rate of return, it appears to the commission that at the present time, if the exchange rate situation is approached upon any other basis than that of rates which will conserve and develop the business and yet be acceptable that exchange rates in the aggregate would have to be increased.

The respondent company (Res. Ex. 5, Trans., p. 258) has offered the following interpretation of the terms "Exchange," "Rate Districts or Zones," and "District Service Area."

"An exchange consists of one or more central offices, usually located in the same city, town or village, and forming a local system providing local service between the sub- [fol. 499] scribers in said city, town or village, or contiguous thereto, at standard rates established for the community they serve."

"Exchanges, particularly if large, are sometimes subdivided into Rate Districts or Zones. The Rate Districts or Zones form only parts of an exchange and, for the purpose of this definition, should not be counted as separate exchanges."

"It sometimes happens that two or more exchanges, each limited by its own boundaries, may be grouped together and treated as one rate area from the standpoint of rates. When this occurs, the group thus formed is not to be counted as one exchange but each of the exchanges composing the group should be counted as one. Such a combination of exchanges as above described is known as a 'District Service Area' and not as an exchange."

"An area within an exchange in which the primary or base rates apply is defined as a Primary Rate Area."

That consideration of such distinctions is fundamental to the business conducted by the respondent company is readily apparent. The necessity for a segregation of the territory served by an exchange into zones which determine the areas for which base or primary rates are quoted, has long since been recognized and such primary rate areas or zones are now on file in conjunction with the rate schedules of respondent company. The primary rate areas and the zones contiguous thereto were determined by the drawing of concentric circles about the central office, except where the growth of multioffice exchanges had more or less destroyed or precluded such a method. It is apparent that such a system does not give due recognition to development, physical and geographical necessities, and limitations, and might result in unnatural and unusual requirements. A proposed readjustment of primary rate areas, both as to the basis for their determination and the extent in each of the particular exchanges throughout the state, has been submitted, purporting to give recognition to physical

and geographical conditions governed by the development, both actual and anticipated, and is evidently much more logical, just and reasonable, than the basis for the determination of the primary rate areas now existing and on file.

The equity of the air line toll rate schedule operated in 1924, as compared with the old county zone system in operation during 1913 and prior thereto, was one of the questions at issue. Under the old county zone system toll rates were based upon a flat unit charge per county traversed without any regard to the size or outline of these counties, [fol. 500] or to the location within the counties of the exchange at which a message originated or terminated, and for this reason were not fair, reasonable, just or equitable. The necessity for quoting exception rates where a volume of business moved was a recognition of the fundamental weakness of this system. No extended discussion of the merits of the existing air line toll rates need be made other than call attention to the fact that it recognizes the three primary factors inherently fundamental in this class of service (Comm. Ex. 3), namely, a fixed charge per call, necessary in recognition of a fixed expense per call and further made necessary as being the simplest solution of the recognition of the long and short haul principle, and the two variables, time and distance. This method places all interexchange or toll traffic upon an equitable and non-discriminatory base through the recognition of these principles.

The net result of the operation of the air line toll rate in the toll line segregation using either the straight line or sinking fund depreciation, as shown in Commission's Exhibit No. 2, for, the year 1914, during which this rate was in effect, and as compared against the year 1913, during which time the county zone system of toll rates was in effect, is an earning not unreasonable or excessive, neither does it fail to produce a reasonable return under the existing plant and traffic conditions.

In reply to interrogation respondent admitted that there were in existence obsolete rates which were the result of contract relations not running concurrently with the rate schedules as filed. (Trans. p. 259.)

These so-called contractual relations, real or implied, have resulted in their being 8,095 subscribers in 1914 who were receiving service at rates at variance with the rates in the schedules now on file and are discriminatory. (Trans p. 258-Res. Ex. 6.)

The rules and practices of the respondent company other than those normal to any business were built around a contractual relation dependent upon an extended period of service. These rules and practices developed conditions in addition to obsolete rates which were the source of numerous complaints. The elimination of these conditions implied the formulation and drafting of new rules and regulations upon an entirely different basis.

[fol. 501] The engineers of the Commission were directed to confer with the engineers of the respondent company looking to the promulgation of a set of rules and regulations by the company which would eliminate, in so far as they were able to determine, the features manifestly and admittedly unsatisfactory to both the company and its patrons. As a result of this conference, involving no small effort and study and extending over quite a period of time, the engineers of the company, together with the engineers of the Commission, have drafted a set of rules and regulations which appear to be satisfactory and to eliminate all causes for complaint which have been made against the former rules and regulation. These have been duly filed by the company. The underlying reasons and the rules directly applicable thereto may be stated as follows:

The necessity for certain definite and specific rules and regulations for the government of the practice and procedure in the conducting of any business is an established and recognized principle. These rules and regulations must admit of ready interpretation and be practically applicable to the conducting of the particular business and the conditions peculiar to that business. The requirements made by the public upon telephone utilities have necessitated rules and regulations peculiar to the problems of this particular business.

While the rules and regulations of the different telephone utilities have not all been in conformity they have all recognized the underlying principles peculiar to and characteristic of the telephone business.

To insure uniformity throughout the state, rules and regulations have been prepared, designed to meet the reasonable requirements of the service, both from the standpoint of the public and the utility. These rules and regulations comprehend the recognized principles of telephone utilities and permit these principles to be administered in reasonable procedure. The rules and regulations are interrelated throughout and form a complete structure. Each rule or regulation also has its particular function in the administration of the business. Since telephone utilities render exchange or interexchange service, or both, the rules and regulations have been formulated to provide for the requirements made in rendering either or both of these services.

[fol. 502] Through provisions made in these rules and regulations the necessity for the existence of the "term contract" with its objectionable features has been eliminated. To provide evidence of a request for service so that a permanent record may be had as to the request for service, type, location, directory listing and other information pertinent thereto, provision should be made for an application, the form of which is to be filed with the Commission. In connection with this application, it is necessary to define the general classification made of telephone service. This refers to the general service types of business and residence, and a further classification of the business type into public and private, and means should be provided by which these are determined. This is to clearly define these segregations and is for the protection of the users of telephone service and the company, in that it will eliminate the abuses which arise from the improper application of a schedule. This is covered by the following rule.

Rule 1

Applicants may be required to sign an application furnished by the company, for the service to be rendered, and to establish their credit as provided in these rules as a condition precedent to service.

The applicability of rates for business and residence service, and for public or private business service, shall be governed by the obvious or actual use made of the service.

Measured rate service is a type within itself and may not be handled with respect to payment as is flat rate service, because the billing is in arrears. Flat rate service types are required to be paid monthly in advance but in the case of measured rate service types, because the billing is in arrears, the utility is entitled to be reasonably safeguarded in this enforced extension of credit and to have the applicants establish their credit before service is rendered. This credit may be established by any one of several methods as elected by the applicant. If he owns the property, that fact alone should establish his credit. If he does not own the property, he may establish his credit by furnishing a guaranty for the payment of his bill signed by a guarantor satisfactory to the utility. If he is a subscriber of the [fol. 503] utility at the effective date of these rules and regulations his credit will be deemed established. If the subscriber does not desire to elect either of these methods, he can establish his credit by making a cash deposit. This permits the applicant to take the initiative and establish his credit in a manner in which he may elect. This is covered in the following rule.

Rule 2

All applicants for measured or coin box exchange service at the time of applying for service shall be required to establish their credit under one of the following methods.

(a) Ownership of Premises.—An applicant who owns the premises in which telephone service is to be installed may establish credit by signing a certificate provided by the company certifying to the ownership. The company will accept the signed certificate as satisfactory evidence of ownership in the absence of any definite knowledge to the contrary.

(b) Guarantor.—An applicant may establish credit by furnishing a guarantor satisfactory to the company, the applicant to obtain the signature of the guarantor on a guaranty form provided by the company. Any applicant furnishing a guarantor not acceptable to the company must establish credit under (a) or (c).

(c) Cash Deposit.—An applicant may establish credit by making a cash deposit as hereinafter provided. Receipts shall be issued for all such cash deposits.

(d) Subscribers as of the Effective Date of These Rules and Regulation.—All subscribers receiving service as of the effective date of these rules and regulations will have established their current credit under this rule.

Since provision in the foregoing rule has been made whereby the applicant may elect to establish credit by a cash deposit, it is necessary to fix a limit on the amount of this deposit.
[fol. 504] The probability of other than a minimum use of residence, measured or coin box exchange service is slight particularly when compared with measured or coin box business service where the requirements may result in a use far in excess of the minimum amount of service associated with the minimum rate, which is referred to as the monthly rate. Consequently a limit has been fixed and a distinction made between the two classes of service in the amount of the deposit required by the following rule.

Rule 3

All applicants for measured or coin box exchange service who establish credit by making a cash deposit shall make a deposit in the following amount:

(a) The deposit required from applicants for business measured or coin box exchange service shall not be in excess of twice the monthly rate for the service.

(b) The deposit required from applicants for residence measured or coin box exchange service shall not be in excess of the monthly rate for the service.

Bills for measured or coin box exchange are rendered in arrears and do not become delinquent until after fifteen (15) days have elapsed subsequent to the receipt of such bill. Since no action on the part of the utility toward disconnecting or refusing to provide service is permitted prior to the expiration of this period, this permits of the accumulation of approximately two months' bill for service before final action can be taken relative to disconnection. For this reason, the maximum amount of the deposit in cases of im-

pairment should be twice the average monthly bill as determined by the two months preceding the impairment. This is covered by the following rule.

Rule 4

Subscribers who have initially established their credit otherwise than by a cash deposit and later fail to pay their bills shall be required to make a cash deposit to guarantee the payment of charges under the following regulations:

[fol. 505] (a) The deposit required from a business measured or coin box exchange subscriber who has impaired his credit shall not be in excess of twice his average monthly bill, based upon the two months preceding the month in which impairment occurs.

(b) The deposit required from a residence measured or coin box exchange subscriber who has impaired his credit shall not be in excess of twice his average monthly bill, based upon the two months preceding the month in which impairment occurs.

Subscribers subject to this rule who refuse to make a cash deposit may be denied further service, but only after the lapse of at least fifteen (15) days after the receipt by the subscriber of the company's notice that service is subject to discontinuance.

The establishment of credit by means of a cash deposit, either on the part of an applicant for service, or of a subscriber who has impaired his credit, necessitates provision for the application of this deposit to unpaid bills. In the case of continuance of service the deposit may be required to be restored in full after all or any part of the deposit has been applied to the impaired bill. The subscriber may be required to pay any amount by which the bill exceeds the deposit, in addition to restoring the deposit. These provisions are covered by the following rule.

Rule 5

Subscribers who have made a cash deposit and fail to pay all charges due are subject to the following rules:

(a) The deposit may be applied in so far as necessary to cover all charges due.

(b) If the deposit equals or exceeds the charges due, the subscriber may be required to make a new deposit as provided by Rule 4. The total deposit shall not exceed that required by Rule 4.

(c) If the deposit does not equal the charges due, the subscriber may be required to pay the remaining amount after applying the deposit, and make a new deposit as required by Rule 4.

As a protection to subscribers against any arbitrary discontinuance of service by a telephone utility and to relieve [fol. 506] the utility of unnecessary expenditure, through issuing additional notices, it is desirable to designate a billing period, within which payment may be made and during which discontinuance may not be made Fifteen days after the receipt of the bill is considered a sufficient period, and the bill should contain a notice calling attention to this period. This is covered by the following rule.

Rule 6

All bills against subscribers receiving measured or coin box exchange service shall be rendered monthly in arrears and shall contain a notice to the effect—that bill is then due and payable and unless paid within fifteen (15) days after receipt of bill, the service is subject to discontinuance without further notice.

It is the general practice of telephone utilities to extend the convenience of toll or telegraph service to all patrons. The telephone utilities are entitled therefore to reasonable protection in payment for service rendered. Since the exact amount of a bill cannot be known until the service is rendered and as these bills may assume any proportions, the utility should have the right to exact payments as occasion may demand. In the event that a subscriber fails to pay the charges due the service is subject to denial and the subscriber may be required to pay all charges due, and to make a cash deposit before further toll or telegraph service is furnished. This is covered by the following rule.

Rule 7

The company may extend credit for toll or telegraph service to any subscriber under the following rules:

(a) If a subscriber avails himself of the convenience of toll or telegraph service and fails to pay the charges therefor, after reasonable notice, the company may deny the convenience of further toll or telegraph service until the subscriber pays the amount due and makes a deposit, not in excess of twice the amount that was due, to cover charges for future toll or telegraph service.

(b) If a subscriber who has made a cash deposit fails to pay his bills for toll or telegraph service, the deposit may be [fol. 507] applied to the subscriber's account for toll or telegraph service, in so far as it will apply. The subscriber will be required to pay his bill in full and may be required to restore the deposit to its original amount before further toll or telegraph service is supplied.

Any subscriber who has made a cash deposit through election or otherwise is entitled to recover that deposit under certain conditions after a reasonable time. Prompt payments of all bills for service rendered over a period of one year is deemed sufficient to establish credit and should entitle a subscriber to have his deposit returned. In the case of impairment of credit, one year shall have elapsed since the date of last impairment before the return of a deposit may be demanded. At the closing of an account at any time, a deposit may be applied against any charges due, and the amount, if any, in excess of such charges should be returned. This will prevent utilities from carrying their patron's deposits indefinitely and also provide sufficient protection for the utility. Such provisions have been made in the following rule.

Rule 8

A cash deposit to guarantee payment for measured or coin box service that has not been impaired for a period of twelve months from the date of establishment of service shall be returned to the subscriber at the end of the twelve months' period. In the case of an impairment of a deposit, the deposit shall be returned to the subscriber only after it

has remained unimpaired for a period of twelve months from the date of the last impairment.

When service is discontinued any deposit may be applied to the charges on the closing bill. The amount of any deposit in excess of the charges shall be returned to the subscriber.

Payment of interest on cash deposits has been common practice among all utilities. This practice is recognized and six per cent. per annum has been adopted but should not apply if service is discontinued within less than one year from the date of the establishment of service. This is covered by the following rule.

[fol. 508] Rule 9

A cash deposit that remains unimpaired for a continuous period of twelve months subsequent to the establishment of service, or from the date of last impairment, shall bear interest at the rate of six per cent. per annum for such twelve months' period. No interest shall be paid if service is discontinued within less than twelve months from the date of establishment of service.

It is a well established principle that utilities which render flat rate service may demand payment in advance. In service of this character the amount to be paid for any given period is definitely known in advance. As direct payment may be required, no form of guaranty is necessary. Advance payments may be made effective by requiring that the amount is due and payable when the bill is received and that service is subject to discontinuance unless the bill is paid within a specified period. This is covered by the following rule.

Rule 10

All applicants for business or residence flat rate service shall be required, upon the establishment of service, to pay in advance the charge for the service for the period of which bills are regularly rendered as specified in the rate schedules.

All bills for flat rate service may be rendered in advance for the periods specified in the rate schedules, and may con-

tain a notice that the bill is due and payable when received, and that service is subject to discontinuance without further notice unless the bill is paid within the period specified therein. The periods specified shall be as follows:

(a) Bills rendered monthly in advance shall specify at least fifteen (15) calendar days after subscriber's receipt of bill.

(b) Bills rendered in advance for periods in excess of one month shall specify at least thirty (30) calendar days after subscriber's receipt of bill.

The company should at its own expense provide all instrumentalities necessary to render service and these [fol. 509] should conform with the established standards of the company. It is necessary, however, that some restriction be placed upon this, permitting the company to refuse demands for installation of service in advance of the needs of the subscriber, or unreasonable in character, and provision made for appeal to, and review by The Public Service Commission of Washington. This is covered by the following rule.

Rule 11

The company shall furnish at its own expense all instrumentalities to provide service covered by its rate schedules.

All instrumentalities provided shall conform with the company's established construction standards.

The company may refuse the installation of service that is not to be immediately used or is unreasonable in character, subject to appeal to The Public Service Commission of Washington.

The company should make all extensions necessary to serve patrons at its own expense, in the territory for which rates are published and filed. However, in case this service requires an extraordinary or unreasonable expenditure for either construction, maintenance, or operation, or is unreasonable in character, it may be refused and made the subject of an agreement, wherein this abnormal cost is in part or as a whole borne by the patron in order that it may not become a burden upon other users of service. This ques-

tion and agreement is subject to review by The Public Service Commission in case of dispute or divergent views. This has been covered by the following rule.

Rule 12

The company will provide, at its own expense, all reasonable extensions necessary to serve applicants in accordance with its published rates filed with The Public Service Commission of Washington and in accordance with its established construction standards.

Any extension which in the company's judgment is unreasonable or should not be made at sole cost to the company may be refused, subject to appeal to The Public Service Commission of Washington by an informal application. [fol. 510] Any extension which is not to be made at the company's sole cast shall be covered by a written agreement between the company and the applicant, defining the terms and conditions under which the extension is to be constructed.

Rule 13

The forms mentioned in the foregoing rules for application for service, certificate of ownership, guaranty, receipts for deposits, and a copy of each written agreement as provided for in Rule 12 shall be filed with The Public Service Commission of Washington.

The cost of making an initial installation is a proper capital charge. The cost that is capitalized cannot be considered as an operating expense, or in any manner assessable against the individual patron. The cost of the initial establishment of service, however, which is not capitalized and therefore becomes an operating expense, is properly assessable against the individual patron who is responsible for the cost being incurred. Likewise, the cost of disconnecting and reconnecting a patron's service is properly assessable against the individual patron. Such costs which do not enter into the capital account should not burden the rates of all patrons, but should be borne by the applicant or subscriber responsible for their occurrence. These costs may be provided for by a service connection charge to each applicant or subscriber for the establish-

ment of service at any location. Such a rule is entirely proper, provided the amount of the charge bears a reasonable relation to the actual average cost involved. This charge eliminates the necessity of the utilities claiming protection under term contracts, short term rates, cancellation charges, penalties or deposits therefor, since the uncapitalized expense occurring at the time of the establishment, disconnection or reconnection, of a patron's service will be met by the payment of a service connection charge. This charge, moreover, taken in conjunction with the protection in the extension of credit covered in the various other rules, should be sufficient protection for the satisfaction of all claims of the various telephone utilities as ordinarily expressed in term contracts, short term rates, cancellation charges, penalties or deposits therefor. While it may not be possible to place in effect a service connection charge in [fol. 511] an amount sufficient to cover the expenses involved in each particular case, the charge should bear a reasonable relation to the actual averge expense incurred, thus placing this expense upon the subscriber responsible for its occurrence, and at the same time relieving the general rate paying public from carrying this burden.

The establishment of a service connection charge should not only be of benefit to the general rate paying public but to the individual subscriber as well, since by any continuous use of the service at any given locality the charge will remain constant for any given period. This charge results in a benefit direct and proportionate to those who are most entitled to the benefit,—the long term user,—and at the same time the short term user, while compensating for short term expense without burdening the long term user, becomes entitled to the same monthly rate for service as the long term user. In other words, a subscriber by paying the service connection charge has relieved the rate system to this extent, hence all subscribers are given the same opportunity of service at the same rates for similar periods. Further, the establishment of this charge should eliminate complaints arising from the application of contract regulations, such as supersedures, transfers, terminations and outside moving charges, since, under this plan there is no necessity for their existence. It is possible, therefore, to eliminate

whatever discrimination has resulted from a contract period, since the proposed plan eliminates the requirement of taking service for any specified period.

It is necessary to make certain provisions to cover added expense in the case of service temporarily disconnected on account of non-payment of charges, subscriber's temporary absence, or for any reason for which the subscriber is responsible.

This expense occurs through the added efforts to collect revenues already due, disconnecting and reconnecting the service, or both. To control these expenses by assessing them against the individual subscriber responsible for their occurrence and to have some reasonable measure which will operate as a deterrent in decreasing the number of temporary disconnections, a restoration charge in conjunction with the payment of the exchange service charges during the period of temporary disconnection is a reasonable provision.

[fol. 512] To provide further for the expense incurred by the individual subscriber for a change of instrument types or the location of instrumentalities after the original installation has been made, specific charges for such service should be provided for. Since the expense upon which these charges are based arises from the action of the individual subscriber the charges are properly assessed against him. This is covered by the following rule.

Rule 14

A service connection charge of $3.50 shall be made to all applicants for the establishment of service at any location, provided that no service connection charge shall be made to applicants who sign for service to be rendered by the use of telephone instruments as then in place, and further provided that no service connection charge shall be made to applicants for farmer line service nor for private branch exchanges and intercommunicating systems, except as hereinafter provided for in Rule 15. Any change in the installation required by the subscriber will be made subject to the established charges therefor.

A charge of $1.00 will be made for restoration of service when service has been temporarily disconnected on account of non-payment, subscriber's temporary absence, or for any

other reason for which the subscriber is responsible, except a change in class of service or location of facilities. Where service is temporarily disconnected for which the subscriber is responsible, the exchange service charges shall apply during the period of disconnection.

Charges for a change of instrumentalities shall be as follows:

(a) Change of location in the same room—$1.00 per station.

(b) Change of location from one room to another, on the same premises—$2.00 per station.

(c) Change from wall to desk set or vice versa—$1.00.

(d) Change in location or address of private branch exchange switchboard or systems, intercommunicating systems or stations and miscellaneous equipment shall be charged for at actual expense.

Changes involving only private branch exchange stations will be charged for in accordance with (a), (b) and (c).

[fol. 513] In recognition of the well established and generally accepted principle of minimum charges for service, provision is made therefor in the following rule.

Rule 15

The minimum charge for service, the rates for which are quoted on a monthly basis, shall be the published monthly rate, and the minimum charge for service, the rates for which are quoted on other than a monthly basis, shall be the published rate therefor; provided that the minimum charge for farmer line stations shall not exceed the rate for six months' service; and further provided, that, at any location, service may not be taken for a period less than herein specified, excepting that the aggregate of the charges for private branch exchanges, inclusive of intercommunicating systems, shall not be less than an amount equal to the annual rate plus the cost of installation and removal.

[fol. 514] Findings of Fact

Considering all the facts in evidence herein, the Commission now makes the following findings:

I

That the fair value as segregated to the various exchanges and toll lines in service as of December 31, 1914, is as follows:

Exchanges	Amount
Aberden	$232,320 69
Ahwaga	38 30
Albion	5,903 89
Almira	2,225 33
Anacortes	46,391 50
Arlington	42,694 05
Auburn	21,658 37
Bay City	32 36
Barneston	36 10
Bellingham	599,685 87
Black Diamond	112 80
Bothell	12,210 25
Buckley	7,172 05
Burlington	30,136 65
Burnett	42 87
Carbonado	50 73
Castle Rock	3,633 23
Centralia	72,445 75
Chewelah	3,345 31
Cle Elum	12,171 70
Clarkston	25,864 86
Colfax	50,522 63
Colville	18,193 79
Conconully	1,759 12
Coupeville	6,657 04
Coulee City	2,473 26
Dayton	35,961 47
Deming	5,313 39
Deer Park	6,210 48
Edison	2,709 02
Edwall	1,641 57
Enumclaw	7,628 03
Ephrata	4,663 73
Eureka	72 89
Everett	298,212 04
Fairfax	86 54

Exchanges	Amount
[fol. 515] Farmington	1,226 78
Frances	564 46
Garfield	2,378 57
Govan	533 35
Harrington	6,833 25
Hartline	769 85
Hatton	625 01
Hoquiam	78,509 20
Issaquah	4,270 72
Kerriston	30 97
Lind	4,875 96
Loon Lake	86 07
Markham	56 96
Marysville	6,785 80
McCormick	17 70
Meyers Falls	253 54
Melmont	62 02
Moclips	190 07
Mohler	52 94
Monroe	34,340 52
Mount Vernon	44,332 23
New Kamilche	40 93
North Yakima	291,412 33
Northport	3,209 17
Oak Harbor	4,765 71
Odessa	4,991 34
Olympia	110,169 98
Orient	204 90
Palmer	598 40
Palouse	14,940 55
Pateros	2,264 32
Port Townsend	28,715 43
Pomeroy	29,353 75
Pullman	37,685 85
Ravensdale	106 95
Rainier	210 37
Ritzville	23,726 32
Rockford	77 06
Rollway	77 03
Roy	1,721 97
Scotia	72 40

Exchanges	Amount
Seattle	6,644,889 05
Sedro Woolley	39,320 23
Shelton	6,719 04
Sherlock	158 67
Snohomish	32,988 53
Spangle	636 14
[fol. 516] Spokane	3,387,264 86
Spokane Bridge	171 09
Sprague	11,582 26
Stanwood	16,972 40
Startup	2,700 56
Sultan	4,591 33
Sumner	9,659 24
Springdale	585 21
Starbuck	2,324 46
Tyler	148 41
Vancouver	137,744 63
Walla Walla	303,600 01
Waitsburg	11,638 92
Washtucna	529 17
Wilbur	9,846 63
Wilkeson	1,366 17
Wilson Creek	2,056 02
Willada	31 30
Winlock	370 79
Winona	83 15
Tacoma	2,386,568 68
Connecting Company Points	11,689 98
Toll Stations Checked	217 73
Toll Lines	3,836,133 98

II

That the respondent company has plant not classed as used and useful in various exchanges throughout the state to the amount of $294,858.56, that is not included in the segregated fair value.

III

That thirty per cent. of the originating interexchange revenue is a fair and reasonable compensation to the exchanges for their toll functions.

IV

That for the years 1913 and 1914, the earnings and expenses of the several exchanges and the toll lines show a per cent. earned on the segregated fair value as follows:

Exchanges	Per cent earned			
	Depreciation on 4% sinking fund basis		Depreciation on straight-line basis	
[fol. 517] Aberdeen	3.34	2.74	2.14	1.53
Almira	....	2.23	....	1.02
Anacortes	13.70*	11.46*	14.90*	12.67*
Arlington	8.00*	4.75*	9.20*	5.96*
Auburn	.08	.17*	.52*	1.38*
Bellingham	2.86*	1.38*	4.05*	2.50*
Bothell	11.62*	13.06*	12.82*	14.28*
Buckley	....	37.75*	....	38.36*
Burlington	16.92*	12.95*	18.10*	14.16*
Castle Rock	....	59.64*	....	60.85*
Centralia	14.08	9.75	12.88	8.54
Chewelah	....	7.54	....	6.33
Clarkston	....	6.13	....	4.92
Cle Elum	2.29*	2.09*	3.49*	3.30*
Colfax	4.51	4.48	3.31	3.27
Colville	1.76*	1.57*	2.96*	2.78*
Coupeville	3.08*	8.40*	7.29*	9.62*
Dayton	2.05	.74*	.85	1.96*
Deer Park	8.43*	19.04*	9.63*	20.25*
Edison	....	12.32*	....	13.53*
Edwall	....	7.42*	....	8.45*
Enumclaw	3.79*	1.05	4.99*	.16*
Eglurata	....	3.72*	....	4.91*
Everett	.02	.01*	.12	1.22*
Harrington	7.19*	7.81*	8.39*	9.02*
Hartline	....	23.15*	....	24.36*
Hesquiam	11.94	11.43	10.74	10.22
Issaquah	....	19.16*	....	20.37*
Lind	6.18	3.91	4.98	2.70
Monroe	6.77*	7.97*	7.97*	9.18*
Mount Vernon	12.45*	12.73*	13.65*	13.94*
Northport	....	39.48*	....	40.69*
North Yakima	5.74	6.22	4.54	5.01
Oak Harbor	1.91*	13.71*	3.11*	14.92*
Odessa	13.99*	9.16*	14.81*	10.37*
Olympia	8.26	4.51	7.06	3.21
Pomeroy	3.33	2.82	2.13	1.61
Port Townsend	11.28*	17.27*	12.48*	18.48*
Palouse	7.18*	4.78*	8.38*	5.95*
Pateros	....	25.91*	....	28.45*
Pullman	2.30*	1.23*	3.50*	2.44*
Ritzville	2.61	1.07*	1.41	2.28*
Roy	....	35.73*	....	36.94*
Seattle	3.06	4.05	1.86	2.84
[fol. 518] Sedro Woolley	13.74*	12.33*	14.94*	13.54*
Shelton	4.09*	5.61*	5.29*	6.82*

Exchanges	Per cent earned			
	Depreciation on 4% sinking fund basis		Depreciation on straight-line basis	
Snohomish	12.83*	7.40*	14.03*	8.61*
Spokane	1.65	2.70	.45	1.49
Sprague	1.65	3.97*	.45	5.18*
Stanwood	14.85*	18.48*	16.05*	19.69*
Starbuck	....	3.85*	....	5.05*
Startup	....	47.92*	....	49.13*
Sulton	19.64*	29.96*	20.85*	31.17*
Sumner	22.05*	25.13*	23.85*	26.34*
Tacoma	1.05	.61	.22*	.00*
Vancouver	2.31	.86	1.11	.35*
Waitsburg	2.41*	2.53*	3.61*	3.74*
Walla Walla	7.25	8.01	6.05	6.80
Wilbur	6.50*	3.98*	7.79*	5.19*
Wilson Creek	....	23.39*	....	24.60*
Remaining Exchanges	17.47*	3.98*	18.67*	5.19*
Total Exchanges	1.82	2.49	.98	1.28
Toll Lines	9.24	8.39	8.05	7.20
Total toll and exchanges	3.35	3.67	2.15	2.46

V

That the basis for the determination of primary rate areas as proposed is reasonable.

VI

That the toll rates now on file with the Commission under the existing conditions of plant and traffic are not unreasonable or excessive.

VII

That the schedules of exchange rates on file with the Commission are not unreasonable.

VIII

That so called obsolete rates differing from the rates of the regular schedules now on file are in effect in various exchanges throughout the state and are contrary to Sec. 41, Chap. 117, Session Laws 1911.

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* Indicates loss.

[fol. 519] IX

That the rules and regulations filed by the respondent company are accepted and approved.

Conclusions

From the foregoing the Commission concludes:

First. That the so-called obsolete rates differing from the rates of the regular schedules now on file are unduly discriminatory and in violation of the statute and should be eliminated.

Second. That the complaint herein in so far as the same refers to the unreasonableness of the rates and the rules and regulations should be dismissed.

Order

It is therefore hereby ordered, that the Pacific Telephone and Telegraph Company be, and it is hereby, directed to eliminate from its rates and schedules all of the so-called obsolete rates, and that the said Telephone and Telegraph Company conform to the regular tariffs and schedules on file with this Commission.

It is further ordered, that the complaint herein, in so far as it relates to the unreasonableness of the rates of the Pacific Telephone and Telegraph Company, and in so far as it relates to the rules and regulations and practices of said company, which have been superseded by the new rules herein referred to and now on file, be, and the same is hereby, dismissed.

Witness the Public Service Commission of Washington this 5th day of August, 1916.

The Public Service Commission of Washington, by E. F. Blaine, Chairman. A. A. Lewis, Commissioner. Frank R. Spinning, Commissioner.

Attest: J. H. Brown, Secretary.

[fol. 520] Pacific Company Exhibit No. 101

Ordinance No. 4985

An ordinance granting to the Sunset Telephone & Telegraph Company, its successors and assigns, the right and privilege to continue to maintain and operate its present telephone and telegraph system, to erect and maintain such additional poles and wires as may be necessary for its telephone and telegraph business, and to maintain and operate an underground telephone and telegraph system, for the period of twenty-five (25) years, in and upon the streets, alleys and public highways of the city of Seattle

Be it ordained by the City of Seattle, as follows:

Sec. 1. Grant; Term, Twenty-five Years.—There is hereby granted, upon the considerations and conditions in this ordinance contained, to the Sunset Telephone & Telegraph Company, a corporation organized and existing under the laws of the State of California, and to its successors and assigns, for a period of twenty-five years from and after the date of the passage of this ordinance, the right and privilege to continue to maintain and operate its present telephone and telegraph system within the said city to erect, maintain and operate such additional poles and wires and other apparatus over and upon the streets, alleys and public highways of the said city as may be necessary for its said telephone and telegraph business, and to maintain and operate its wires and other conductors for its said telephones and telegraph business in underground pipes or conduits with the necessary man-holes and other appliances in and under the said streets, alleys and public highways of the said city.

Sec. 2. Underground Wires.—Said grantee, its successors and assigns, shall construct the said underground sys-
[fol. 521] tem under the supervision of the Board of Public Works of the City of Seattle as fast as is reasonable and practicable and consistent with the conditions existing and the requirements of the population of the said city; and shall remove its main line poles and wires from those

streets, alleys and public highways in and under which it shall maintain and operate its wires and other conductors in underground conduits and pipes; all necessary connections to subscribers' stations and to other points may be made from such wires and conductors and with such means, apparatus or appliances as may be requisite.

Sec. 3. Excavations in Streets; Poles; Removal of Poles; Restoration of Streets.—The said grantee, its successors and assigns, upon receiving a permit so to do from the Board of Public Works of the City of Seattle, may make all necessary excavations in any of said streets, alleys or public highways for the purpose of erecting and maintaining poles and other supports for its wires or conductors and for repairing the same, and for the purpose of laying, repairing and maintaining said underground pipes or conduits, and for placing, repairing, maintaining and operating its wires and other conductors therein. All poles erected and maintained pursuant to the terms of this ordinance shall be erected in a good and substantial manner and placed immediately behind the curb unless otherwise directed by the Board of Public Works, and shall be painted. The Board of Public Works shall have the right to cause said grantee, its successors or assigns, to move the location of any pole whenever the public convenience shall require the location of the same elsewhere; the expense of said removal to be paid by said grantee, its successors or assigns. [fol. 522] When any excavation shall have been made pursuant to the authority hereby granted, the said grantee, its successors and assigns, shall, as soon as possible, restore the portion of the street, alley or public highway excavated to the same good order and condition in which it was prior to said work, and all said work shall be done in compliance with the necessary rule, regulations, ordinances or orders which may during the continuance of this franchise be adopted from time to time by the said City of Seattle or the Board of Public Works thereof, and said work of repairing said streets, alleys and public highways shall be done to the satisfaction of said Board of Public Works.

Sec. 4. Acceptance; Bond to Restore Streets.—Within thirty (30) days after the date of the passage of this ordinance the said grantee shall file with the City Clerk of the

City of Seattle its written acceptance of all the terms and conditions of this franchise, and also a bond in the sum of ten thousand dollars, with sufficient surety or sureties to be approved as provided by the City Charter and conditioned that each and every street, alley or highway, or any portion thereof, that may be disturbed or torn up by said grantee, under the provisions of this ordinance, shall be replaced and put in as good order and condition as the same was in before it was disturbed or torn up, and further conditioned that the said grantee will faithfully keep and perform each and every term and condition imposed upon it by this ordinance.

Sec. 5. City Reserves Right to Improve Streets.—Nothing in this ordinance shall be construed as in anywise to prevent the proper authorities of the said City from sewering, grading, paving, planking, repairing or altering any of the streets, alleys or public highways of said city, but [fol. 523] all such work shall be done, if possible, in such a manner as not to obstruct, injure or prevent the free use and operation of the said telephone and telegraph system of said grantee, its successors or assigns.

Sec. 6. Free Telephone to City and Fire and Police Departments—The rights and privileges granted by this ordinance are granted only upon the condition herein contained and upon the following consideration, to wit: That during the entire existence and continuance of this franchise the said grantee shall furnish and maintain for said City, free of charge, twelve (12) telephones with exchange connections and free local switching, the same to be placed in such offices, places and buildings as the City Council may, from time to time designate, said telephones to be for the use of the public officers of the said City in the discharge of official duty and said grantee, its successors and assigns, shall also supply free of charge and keep in repair for said City, twenty-five (25) telephone for fire alarm and police telegraph purposes which shall not have connection with the exchange of said grantee and said Cityshall have the right to suspend upon the tops of the poles placed by said grantee, its successors and assigns, in the streets, alleys and public highways of said city, any and all wires which the City may require for fire alarm and police tele-

graph purposes, and the said grantee shall further provide wires through its underground cables, sufficient for the City fire alarm and police telegraph circuits, all of which privileges shall be free of charge to said City, it being agreed, however, that the City shall not use upon such circuits any telephone except those furnished by the grantee herein.

Sec. 7. Removal of Buildings.—That whenever any per [fol. 524] son or persons, company or corporation shall have obtained permission of the Board of Public Works to remove any building structure or edifice through any street or streets of said City of Seattle with which the lines or wires of the Sunset Telephone & Telegraph Company shall in any manner interfere, the said Company, its successors or assigns, shall, upon twenty-four (24) hours' notice from the Board of Public Works, raise or remove said lines or wires so as to allow free and unobstructed passage of any such building, structure or edifice; and if the said Company, its successors and assigns, shall neglect or refuse, upon such notice, to remove or raise such line or lines, said line or lines shall be removed or raised by the Board of Public Works at the expense of said Company, so as to admit of the free passage of such building or other edifice or structure.

Sec. 8. Removal of Poles.—That whenever it shall be necessary in grading any street or alley of said City, or in building any sidewalk, or making any other improvement thereon, to remove any pole or poles belonging to said company, or on which any line or lines, wire or wires, belonging to said company shall be stretched or fastened, the said company, its successors and assigns, shall upon receiving twenty-four (24) hours' notice from the Board of Public Works, remove such pole or poles; and if said Company, its successors and assigns, upon such notice, shall neglect or refuse to remove such pole or poles, then such pole or poles shall be removed by the Board of Public Works at the expense of said Company.

Sec. 9. Covenant to Save City Harmless from Damages.—That said Company, its successors and assigns, hereby agrees and covenants to indemnify the City of Seattle for

[fol. 525] any injury arising from, or any casualty or accident to person or property by reason of, and neglect or omission to keep said poles and wires in a safe condition, and for all valid claims against said City of Seattle for damages caused by said poles or wires.

Sec. 10. Term of Franchise.—The rights, privileges and franchises herein granted shall continue and be in force for the period of twenty-five (25) years from and after the date of the passage of this ordinance.

Sec. 11. Subject to Repeal or Modification.—The rights, privileges and franchises hereby granted are subject to the right of the City Council at any time hereafter to repeal, change, or modify the same, having due regard, however, to the rights of the parties and the interests of the public.

[fol. 526] PAC. CO. EX. NO. 102

Resolution No. 7495

A Resolution Effecting a Stay of Consideration of the Pacific Telephone and Telegraph Company's Application for a Franchise

Whereas, The Pacific Telephone and Telegraph Company has made application (Comptroller's File No. 89565) for a renewal of its franchise under which it does business in the City of Seattle, which said franchise is about to expire; and,

Whereas, said Telephone Company has instituted certain litigation with a view to securing an increase in rates, including a cause now pending in the Federal Courts; Now, Therefore,

Be it resolved by the City Council of the City of Seattle, That The Pacific Telephone and Telegraph Company be notified, by transmittal of a certified copy of this resolution, that, as a prerequisite to consideration of its said application for a franchise, it must first dismiss, with prejudice, all pending litigation looking to increased rates within the City of Seattle.

And be it further resolved, That until said Company has so dismissed said litigation, the City Council shall not further consider the application hereinabove referred to.

Passed the City Council the 13th day of August, 1923, and signed by me in open session in authentication of its passage, this 13th day of August, 1923.

C. B. Fitzgerald, President of the City Council.

Filed the 13th day of August, 1923.

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk.

[fol. 527] DEFENDANT'S EXHIBIT NO. 12, PACIFIC CO. CASE

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the within is a full, true and correct copy of the original Opinion and Findings of Fact, dated April 25, 1916, in consolidated cases Nos. 1810 and 1825, The Public Service Commission of Washington, Complainant vs. Pacific Telephone and Telegraph Company, Respondent, now on file in the office of the Department of Public Works of Washington.

In witness whereof, I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington, this 25th day of May, 1925.

C. E. Van Etten, Secretary of the Department of Public Works of Washington. (Seal.)

[fol. 528] BEFORE THE PUBLIC SERVICE COMMISSION OF WASHINGTON

No. 1810

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

No. 1825

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Proceedings Relating to Rates, Tolls, Charges Contracts, and Rules and Regulations in This Cause

Opinion and Findings of Fact

[fol. 529] REYNOLDS, Chairman:

By consent of all parties, causes Nos. 1810 and 1825 have been consolidated (Tr., page 5), but the findings and order herein refer only to the valuation. The exchange rates, tolls, charges, contracts, rules and regulations will be considered in a separate order. It was consented by the company that any segregation of value as to communities might be considered and made a part of the findings in the rate case, cause No. 1825.

The valuation proceedings were set for hearing at the assembly room of the Tacoma Commercial Club in the city of Tacoma, Washington, on Monday, January 24, 1916, at 9:30 a. m., at which time and place evidence was received relating to value of the property of the Pacific Telephone and Telegraph Company within the State of Washington. The Public Service Commission was represented at said hearing by Scott Z. Henderson, assistant attorney general; the respondent company by H. D. Pillsbury, J. T. Shaw, and Otto B. Rupp, its attorneys; the City of Seattle by

Ralph Pierce, its assistant corporation counsel; the City of Spokane by C. M. Fassett, commissioner of public utilities, and H. M. Stephens, its corporation counsel; the city of North Yakima by L. O. Meigs, its corporation counsel, and the city of Tacoma by T. L. Stiles, its corporation counsel.

Said hearing was continued by consent of all parties to February 23, 1916, and then to March 20, 1916, at which time further testimony was taken by the Commission at the city of Olympia, and the valuation proceedings submitted to the Commission for its decision.

Commission's Exhibit "C" contains a "statement of bases and governing principles involved in work of Commission's engineers" (page 2), and "a statement of bases and governing principles involved in work of telephone company's engineers" (page 5).

The engineers of the Commission followed the usual cost of reproduction method of appraisal. The report covers all of the requirements of our statute (session Laws of Washington, 1911, chapter 117, section 92). The commission will follow the statute and make findings as required therein. No one of the factors found under the cost of reproduction method represents the amount to be used as "fair value" or "rate base." The statute is silent upon the question of the finding of "fair value" or a base for rates. The Commission is directed to find the "market value," but no one contends that the "market value" is always a fair bases for rates. Since the Commission is required to ascertain the fair, just, reasonable and sufficient rates for telephone service, the Commission will assume [fol. 530] that it is authorized to find a "rate base."

The respondent company, while producing figures on some of the matters required to be considered by our statute, has vigorously attacked the cost of reproduction method of valuation, and has suggested an "actual performance" method, which, where practicable, seems to present many strong reasons for its adoption. The cost of reproduction method has not proven entirely satisfactory to courts and commissions.

The Commission will disregard the reproduction cost estimate submitted by respondent. It has for its bases the actual performance record, and assumes hypothetical con-

dition of extraordinary cost due to forced construction, which forced construction is not substantiated by reference to the testimony of Mr. Flaeger (Trans., page 425) and Mr. Griswold (Trans., page 458), wherein they state that as a matter of fact approximately 75 per cent of the present plant has been built, or reconstructed, in the course of their actual performance within a period which approximates their assumed construction period.

In Simpson vs. Shepherd, 230 U. S. 352, (Minnesota Rate Case), Justice Hughes, speaking for the court, took occasion to disapprove the reproduction theory of value as applied to the valuation of right-of-way. Mr. Justice Hughes said:

"The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture. * * * Presented with an impossible hypothesis, and in endeavoring to conform to it, the appraisers—men of ability and experience—Were manifestly seeking to give their best judgment as to what the railroad right-of-way was worth.

"Cost of reproduction new" may or may not represent the amount which the utility necessarily expended, the detriment they necessarily suffered to bring the plant up to its present status. Telephone plants are not constructed upon the cost of reproduction theory, but extension is added to extension, and piece by piece the whole system is brought to a point where it can efficiently and adequately serve the public. If unit costs for labor are based upon continuous construction alone, as is necessarily followed under the cost of reproduction theory, the unit costs for labor will be low, if from extension work alone the unit prices are obtained, the price will be high. The commission must use its best judgment in ascertaining the average cost, bearing in mind that some of the plant is the result of continuous construction and part piece construction.

In this case the wide divergence of results in attempting to determine the cost of reproduction of respondent's property will be noted. The commission's engineers found the "cost of reproduction" as of the date December 31,

1913, to be $16,765,383.03, and calculated the development of cost at 8 per cent upon the investment to be $2,396,400.01 as of the same date. The sum of these two figures is $19,161,783.03. Respondent's engineers found a "reproduc-[fol. 531] tion cost," including development cost, to be the sum of $26,892,700.00. This shows an apparent difference of $7,730,916.97. As stated above, we will disregard respondent's "reproduction cost." It contains elements which we believe should not be considered in the valuation of utility property. The only figure comparable with the $19,161,783.03 is the company's figure of $19,246,088.45 minus $201,147.72 or $19,044,940.73 taken from their "actual performance appraisal."

The company's "actual performance appraisal" which it claims as the "rate base" upon which it is entitled to a return from its patrons, is the sum of $19,246,088.45. When we consider development cost in connection with the Commission's "cost of reproduction," we find that the Commission's figures are less than the "rate base" claimed by respondent, if development cost be calculated at 8 per cent and capitalized, by $84,305.41.

Respondent company also vigorously attacks the fair value theory as a basis for rate making. It will be conceded since the amendment of our statute eliminating the valuation of the Commission as a basis for taxation, that the only practical reason for valuation under the law of this state is the establishment of fair, just and reasonable rates and practices. The Commissions, unfortunately, has no jurisdiction over the issuance of securities, so that for all practical purposes the only good to be derived from valuation is to prevent unjust and unreasonable charges to the public:

Speaking of value as a bases for rates, Justice Hughes in the "Minnesota Rate Case," supra, says:

"In determining whether that right (right to receive just compensation) has been denied, each case must rest upon its special facts. But the general principles which are applicable in a case of this character have been set forth in the decisions. (1) The bases of calculation is the 'fair value of the property' used for the convenience of the public. (2) The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there

must be a reasonable judgment having its basis in proper consideration of relevant facts."

Justice Harlan in Smythe vs. Ames said:

"How such compensation may be ascertained and what are the necessary elements in such inquiry, will always be an embarrassing question."

Our attention is called to the fact that value is resultant, not a premise. Value is defined by Webster to be the "property or aggregate properties of a thing by which it is rendered useful or desirable." A utility is rendered useful or desirable to the owners thereof by reason of the return it will bring to its owners in the way of net profits. If we take this definition of the term "value" and make such value the basis for rate making each time we increase the return we increase the desirableness of the property or properties, and on the other hand if we decrease the return, we decrease that which makes the thing desirable; and so, if we decrease the return we decrease the value, and [fol. 532] if we increase the return we increase the value. Value is a shifting, variable thing depending upon many factors,—the money markets, shifting populations, demand, competition, politics, weather conditions, taxes,—the varied opinions of men, and the rates themselves, all have to do with the rise and fall of values. To say that rates are to be based upon the value of the property, using the term in its usual and ordinary sense, is to say that rates shall be based upon one premise today, another tomorrow. So we must conclude that when the courts said that rates were to be based upon "fair value," they could not have meant to use the word "value" in the sense in which the word is ordinarily used and understood.

It is suggested that the term "value" is limited by the word "fair," and that by the use of the word "fair" the value is limited to the sum of those elements which justly constitute the "rate base." While the aggregated elements that constitute the "rate base" have value, and the term "fair value" may be used to express that thought, it would seem, to avoid confusion, it were better to choose language that more aptly expresses the thought. The "rate Base"

is not and can not always be in fact and truth the "fair value" of the utility. We can say, if we will, that for the purpose of this opinion where the word "white" is used it means "black," and no harm is done, but were it not better to use the term that in its ordinary use expresses the thought desired to be expressed? When we speak of "rate base," he who runs may read and understand but when we speak of "fair value," we are in the midst of confusion. We have "value" for taxation, which our courts and legislatures have distinguished from "fair value" for rate purposes. We have "value" for condemnation purposes, which is also distinguishable. We have also "value" upon which is based securities, also distinguishable. We must assume that all these values are "fair" for the purpose intended. Were it not better to follow the suggestion of respondent, and adopt a ter- that expresses the exact thought? In other words, is it not better to find some term that expresses the measure of that which has been done by the utility, and which was necessary to be done for the public, and use that term to measure the reqard the utility is entitled to receive, rather than base such reqard upon what the utilty has done for the public, plus what the public has done for the utility, and upon that base the return? If rates are to be based upon what the public does for the utility, the public should share in the profits. "Fair value" must necessarily include all property used and useful whether supplied by the company or the public.

It was never intended that rate payers should be required to pay interest to the utility upon the added value of its property, resulting from a city's paving over conduits and mains, and respondent here makes no such claim; yet such value must necessarily be a part of the "fair value" of the property. The courts never intended to required rate payers to contribute additional returns to the utility by [fol. 533] reason of all "unearned increment," which in many cases, if considered as a part of the "rate base," would result in rates absolutely prohibitive.

Why should the public be required to increase the return to the utility as a result of some act or acts on the part of the public that have already increased the value of the utility's property? The utility is the agent of the

public in the performance of a public service. Assume that the principal should perform the service itself, would the increase of population be a reason for increasing the rates for service? On the contrary, as the use increased the rates would decrease. If the "unearned increment" were added to the "rate base," however, the increased use would hold the rates or be urged as a sound reason for an increase. "Unearned increment" is not a fixed thing. Populations are shifting. If we adopt the unearned increment theory, and add it to the many elements already considered as a part of the "rate base" we shall have a shifting premise. If popul-tion should decrease, values would shrink and would it then be just to say to the utility—"You have invested a large sum of money in property. The value of the property has decreased, therefore you are entitled to a return upon a sum much less than your actual investment. The "rate base" should not be subject to shifting population.

Respondent says (Commission's Exhibit "C" page 16):

"This company now possesses rights-of-way the present value of which is almost beyond computation; many of them could never be secured under modern developments • • • Such rights-of-way have a high value, and but few could be reproduced. For these allowances should be made on the basis of the incidental investment above referred to."

Respondent recognizes the fact that the added value to its property is the result of developments over which it had no control. It does not, however, demand of the public that this added value be made a part of the "rate." It says to the public: "We ask compensation for what we do, not for what you do."

A careful examination of all the decisions discloses the fact that no definition of the term "fair value" as used as a bases for rates, has ever been made. The courts have said "fair value" without defining the term, and the statute is silent on the subject. They have said that the commission shall consider certain things which they enumerate, and which are enumerated in our statute, and which we have considered in this case, but they do not say how much

weight should be given to the things enumerated. "Each case," they say, "must rest upon its special facts—it is not a matter of formulæ," and then the whole subject is left to the sound judgment of the Commission without even a definition of the result to be found. We do not see how it is possible to use the term "fair value" as a basis for rates without including elements in the "rate base" that ought clearly to be excluded.

Is it not possible to develop some specific description that will include the things to be a part of the "rate base," and exclude the things not to be considered? What is meant by the term "fair value" when it is used to represent [fol. 534] the "rate base" or the premise from which is developed the fair and just compensation a utility is entitled to receive from its patrons? The term "fair value" as used in rate making may be defined to be the reasonable and necessary detriment a utility suffers in preparation for and in the service of its patrons. It would seem equitable, just and fair that the public should be required to furnish fair, just and reasonable compensation for the reasonable and necessary detriment a utility has suffered by reason of its service to the public. This reasonable and necessary detriment is a fixed, not a shifting thing. It is not dependent upon the present money markets, nor upon rates, nor any of the many factors that are the basis of value. The detriment is not a resultant, it is a base from which the service flows. It is not just that the public should be required to compensate a utility for expenditures not necessary, nor for values created by the public and which were in no sense a detriment required by the service. The detriment a utility suffers is not affected by shifting population, by hard times, but is a certain fixed and definite amount which can be ascertained and established, and which will remain the same through all times. The value of money may rise or fall, but the detriment suffered by the utility will remain in the same and can be measured as of the date incurred. If regulation is to prove successful and to continue as the method of dealing with public utilities, some fair and certain bases of calculation must be arrived at. It is a matter that should not be left to the fickle, varying judgment of men, but such

investments should be made fixed, positive and secure. The ascertainment of a definite "rate base" is of so far-reaching importance, that it should not be left as a matter of guess between widely divergent views. The old methods have proven uncertain, indefinite and unsatisfactory to honest utilities and commissions alike; Their chief use has been to furnish an easy method to conceal inflated value and dubious financial transactions. Some more stable method should be devised, a method that will eliminate speculation, allow the honest investor to prosper, and destroy the crooked financier, or regulation will prove as unsatisfactory as unbridled competition or unregulated monopoly.

The respondent in this case makes a frank statement of its opinion of the old method, and asks this Commission to adopt the new. Respondent has submitted "actual performance" figures which give the Commission a fixed and definite bases for rates.

Respondent says:

"Actual performance segregated or separated in accordance with interstate commerce accounting, supplemented by such state commission accounting as may be essential will give an array of facts as distinguished from an array of opinion, expert or otherwise, that ought to be the recourse for constructive and efficient regulation."

The case as presented by respondent company in this instance is not based upon theory. The commission is not asked to guess, but the "actual performance" of the company, based upon its records, is made the base upon which [fol. 535] respondent claims the right to be compensated by the public it serves. Theoretical figures were given as a check upon the "actual performance" results. No case has ever been submitted to this commission, and, so far as we are informed, to any other commission upon this bases. Respondent frankly disclaims any right to a return from the public based upon the added value of its property created by the various cities in this state by paving over conduits and mains. It frankly disclaims any right to levy tribute upon the people of the state by reason of the increase in the value of property, which has resulted solely from

acts of the public. In valuing the lands owned by respondent, we have followed the rule suggested by Justice Hughes:

"And where the inquiry is as to the fair value of the property in order to determine the reasonableness of the return allowed by the ratemaking power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value over the amount invested in it and beyond the value of similar property owned by others solely by reason of the fact that it is used in the public service" (Minnesota Rate Case, supra).

We, therefore, adopt and approve the plan suggested by respondent, that rates are to be based upon facts, rather than theories; that "fair value" if the words are to be used in their usual and ordinary sense, cannot be the basis for rates, that a utility is entitled to reasonable compensation based upon the reasonable and necessary detriment suffered in preparation for and in the service of its patrons, and not upon value created by the public. It is not to be conceived that a utility will, in the expenditure of its money, under modern conditions, for the construction of t is plan of its extension, pay more for the implements or property used than is necessary.

These actual performance records, therefore, when ver they can be obtained, should be the storehouse from whence is drawn the facts upon which is based the actual, reasonable and necessary detriment suffered by the utility in serving the public, and whatever that detriment may be, the public in justice and equity should return fair compensation upon that sum. Taking then, into consideration the "actual performance" of this company, as well as all the elements provided by statute what has been the honest, reasonable and necessary detriment this respondent has suffered in serving its patrons in this state, and in being reasonably prepared to take care of future business?

There is contained in respondent's "actual performance appraisal" as due from subscribers and agents, the sum of $201,147.72. This sum is an asset of the company; so are all bills receivable assets of the company. However, it it not an item to be capitalized as a part of the rate base.

A telephone company must necessarily incur develop-

ment cost. The plant costs for an exchange up to capacity is approximately the same. This initial expenditure occurs when the engineers decide that increasing population requires the construction of a new exchange. During many months and probably years, an exchange wisely constructed [fol. 536] and based upon the probable growth of a community may be a losing proposition or at best produce a return wholly inadequate. Justice demands that this fact be considered if the public is to exercise its rights of limiting the return.

We will not include in the sum which we finally determine to be the "rate base" the full amount reported by our engineers, but an amount which in our judgment will fairly represent "development cost."

Considering the foregoing and all elements enumerated to be considered by the Commission in our statute (Session Laws of Washington, 1911, Chapter 117, section 92) and having fully considered all of the evidence herein, and being fully advised in the premises, the Commission now finds:

I

That respondent, The Pacific Telephone and Telegraph Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, and is engaged in the telephone business in the State of Washington, and is a public utility managing telephone lines, and conducts the business of affording telephonic communication for hire in the State of Washington.

II

That the cost of construction and equipment, including the amount expended for permanent improvements and the amounts properly charged to construction of respondent's property in the State of Washington, as of December 31, 1914, is the sum of $18,467,296.41.

III

That the cost of reproduction new of the respondent's property in the State of Washington, as of December 31, 1914, is the sum of $17,147,592.07.

IV

That the cost of reproducing respondent's property in its present condition in the State of Washington, as of December 31, 1914, is the sum of $14,011,297.48.

V

That the outstanding securities of the respondent company as of December 31, 1914, are as follows:

Common stock	$18,000,000
Prefered stock	32,000,000
Funded debt	41,375,000
Unsecured debt	3,600,000
Total	$94,975,000

VI

That the relative value of the use to which such property in the State of Washington is actually put, in the conducting of interstate business and state business respectively for the year 1914, is 13-100 per cent and 99 87-100 per cent [fol. 537] of respondent's entire property within the State of Washington (Trans. 747, Exhibit 17).

VII

That the earnings of respondent company in the State of Washington for the year 1914, is the sum of $4,106,602.59.

VIII

That the expense of the respondent company, exclusive of depreciation, in the State of Washington for the Year 1914, is the sum of $2,588,504.94.

IX

That the total market value of respondent company's property in the State of Washington, used for the convenience of the public as of December 31, 1913, is the sum of $22,000,00 (Trans. 678).

X

That the earning capacity of respondent company's property in the State of Washington for interstate business is the sum of $202,128.16 (Trans. 749, Exhibit 18).

XI

That the earning capacity of respondent company's property in the State of Washington for intrastate business is the sum of $3,897,619.86 (Trans. 749, Exhibit 18).

XII

That the probable earning capacity of the respondent company's property in the State of Washington under the rate now charged is the sum of $4,106,602.59, and that the amount required to meet fixed charges and operating expenses is the sum of $3,311,461.00.

XIII

That the expenditures already made by respondent company in procuring its property were justified by the then existing conditions, and such as might reasonably be expected in the immediate future, and the money expended by respondent has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

XIV

That the net additions to the property of respondent company in the state of Washington for the year 1914 is the sum of $382,209.00.

XV

That the valuation includes the property in Tacoma, Washington, held in the name of the Sunset Telephone and Telegraph Company, it having been stipulated by respondent that such property should be considered in this hearing as a part of the property of the Pacific Telephone and Telegraph Company, respondent owning all of the

[fol. 538] stock of said Sunset Telephone and Telegraph Company, and operating it as a unit of the Pacific Telephone and Telegraph Company.

XIV

That the fair value of respondent's entire property, or rate base from which should be estimated the just, fair, reasonable and sufficient return to respondent as of December 31, 1914, is the sum of $19,382,209.00. Rates will be determined from this sum, or such part thereof as is used for public convenience at the date of establishing just, fair and sufficient rates.

Witness the Public Service Commission of Washington this 25th day of April, 1916.

The Public Service Commission of Washington, by C. A. Reynolds, Chairman. Frank R. Spinning, Commissioner.

By Lewis:

While the "Actual performance" method of appraisal as used by the respondent has commendable features, I am not prepared to adopt it at this time as a principle without a more careful study of the application of the method to the future work of this Commission. I therefore, concur only in the findings of fact and result which are based on the statutory requirements.

By Arthur A. Lewis, Commissioner.

Attest: J. H. Brown, Secretary.

[fol. 539] Defendant's Exhibit No. 30, Pacific Company Case

This indenture, made this 3rd day of May, 1923, between The Pacific Telephone and Telegraph Company, a corpo- of the State of California, party of the first part, and F. H. Crosby, of San Francisco, California, party of the second part,

Witnesseth: That said party of the first part, for and in consideration of the sum of ten dollars ($10), lawful

money of the United States, to it paid by the party of the second part, receipt of which is hereby acknowledged, has sold, assigned, transferred and set over, and does by these presents sell, assign, transfer and set over unto the party of the second part, his heirs and assigns, any and all right, title or interest which the party of the first part may have in or to that certain franchise granted by the City of Seattle to John S. McGroaty and George C. Blanker by Ordinance Number 6498 entitled

"An Ordinance granting to John S. McGroary and George C. Blanker, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph system, to erect and maintain telephone and telegraph poles, and to run, suspend, maintain and operate wires for a telephone and telegraph system for a period of twenty-five (25) years, in, over, upon and under streets, alleys and public highways of the City of Seattle,"

as amended by Ordinance Number 7143 entitled

"An Ordinance amending Section 13 of an ordinance of the City of Seattle, numbered 6498, entitled 'An Ordinance granting to John S. McGroaty and George C. Blanker, their successors and assigns, the right and privilege to construct and maintain conduits for an underground telephone and telegraph ssytem, to erect and maintain telephone and telegraph poles, and to run, suspend, maintain and operate wires for a telephone and telegraph system for a period of twenty-five years in, over, upon and under the streets, alleys and public highways of the city of Seattle,' so as to authorize the sale, mortgaging and encumbering by said [fol. 540] grantees, their successors and assigns, the franchises granted, and amending said ordinances by adding thereto a new section, numbered 13½, authorizing said John S. McGroaty and George C. Blanker, their successors and assigns, to acquire by purchase or otherwise, any completed or partially constructed telephone and telegraph plants, and poles, wires, 'phones and other appliances erected and placed under any other franchises, and providing that the same shall be deemed and accepted as constructed and acquired under and in compliance with the requirements of said Ordinance numbered 6498."

To have and to hold the said franchise unto the said party of the second part, and to his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its officers thereunto duly authorized, the day and year first above written.

The Pacific Telephone and Telegraph Company, by G. E. McFarland, President. By T. V. Halsey, Secretary.

[fol. 541] I, T. V. Halsey, Secretary of The Pacific Telephone and Telegraph Company, a corporation, do hereby certify: That on this 4th day of May, 1923, I carefully compared the annexed copy of Assignment of Franchise from The Pacific Telephone and Telegraph Company to F. H. Crosby with the original thereof now in the possession of F. H. Crosby, and that the same is a full, true and correct copy of said original Assignment of Franchise.

Witness my hand and the seal of said corporation this 4th day of May, 1923.

(Signed) T. V. Halsey.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 3rd day of May in the year one thousand nine hundred and Twenty-three, before me, Grace Campbell, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared G. E. McFarland and T. V. Halsey known to me to be the President and Secretary respectively of The Pacific Telephone and Telegraph Company the corporation described in and that executed the within instrument, and also known to me to be the persons who executed it on behalf of the Corporation therein named, and they acknowledged to me that such corporation executed the same.

In witness Whereof, I have hereunto set my hand and affixed my Official seal, at my office in the city and county of

San Francisco, State of California, the day and year in this Certificate first above written.

Grace Campbell, Notary Public in and for the City and County of San Francisco, State of California. 228 Montgomery St. My commission expires August 20th, 1925. (Seal.)

[fol. 542] Assignment of Franchise

The Pacific Telephone and Telegraph Company

to

F. H. Crosby

Dated May 3, 1923.

Filed May 9, 1923, — o'clock — M. H. W. Carroll, City Comptroller and ex-Officio City Clerk.

Pillsbury, Madison & Sutro, Attorneys at Law, Standard Oil Building, San Francisco, Cal. J.

[fol. 543] State of Washington,
County of King,
City of Seattle, ss:

I, H. W. Carroll, City Comptroller and ex-officio city clerk of the City of Seattle, do hereby certify that the within and foregoing is a true and correct copy of assignment of Franchise. The Pacific Telephone and Telegraph Company, to F. H. Crosby, being City Clerk's File No. 89380, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the City of Seattle this 24th day of July, 1914.

H. C. Carroll, City Comptroller and ex-Officio City Clerk of the City of Seattle, by L. S. Barnes, Deputy. (Seal.)

[fol. 544] Defendant's Exhibit No. 31, Pacific Company Case

State of Washington,
County of Thurston, ss:

I hereby certify that the within is a full, true and correct copy of the original Findings of Fact and Order of The Railroad Commission of Washington, dated September 29, 1911, in cause No. 31 The Railroad Commission of Washington ex rel. Seattle Hardware Company, Complainant, vs. The Pacific Telephone and Telegraph Company, a corporation, Independent Telephone Company, a corporation, the City of Seattle, a municipal corporation, The Seattle Chamber of Commerce, The Seattle Commercial Club, Defendants, now on file in the office of the Department of Public Works of Washington.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington, this 10th day of July, 1924.

Sam L. Crawford, Secretary the Department of Public Works of Washington. (Seal.)

[fol. 545] Before the Railroad Commission of Washington

No. 31

The Railroad Commission of Washington ex Rel. Seattle Hardware Company, Complainant,

vs.

The Pacific Telephone & Telegraph Company, a Corporation; Independent Telephone Company, a Corporation; The City of Seattle, a Municipal Corporation; The Seattle Chamber of Commerce, The Seattle Commercial Club, Defendants

Findings of Fact and Order

This cause coming on regularly to be heard before The Public Service Commission of Washington on this 25th day of September, 1911;

And it appearing to the Commission that this cause was duly called for hearing before the Railroad Commission of Washington pursuant to notice duly given on the Complaint herein and at the time specified in said notice, the Railroad Commission of Washington appearing by its members, and W. V. Tanner, its attorney; the Pacific Telephone & Telegraph Company appearing by F. T. Post, its Attorney; the Independent Telephone company appearing by George D. Emery, its attorney, and E. E. Webster, its General Manager; the City of Seattle appearing by Scott Calhoun, corporation counsel; the Seattle Chamber of Commerce appearing by George Walker, its attorney; the Seattle Commercial Club appearing by Richard Saxe Jones, its attorney; and evidence having been introduced by and on behalf of the Complainant, and by and on behalf of the [fol. 546] Defendants herein, and the cause having been submitted to the Commission and the Commission being fully advised in the premises, does now make the render the fol-owing Find-gs of Fact:

I

The hearing of this cause having been consolidated with cause No. 125, the same being a hearing for the purpose of ascertaining the value of the property used by the defendant Independent Telephone Company, and with Cause No. 169, the same being a hearing for the purpose of ascertaining the value of the property used by the defendant Pacific Telephone & Telegraph Company, insofar as the taking of testimony and argument are concerned, and Findings of Fact having been duly made and rendered in said valuation hearing affecting the property of the defendant Independent Telephone Company upon the evidence introduced and heard in such consolidated cause, the said Findings are now adopted and made a part of the Findings in this cause, that is to say:

Finding No. 1, to and including Finding No. 17, together with Exhibits are made a part of said Findings in said cause No. 125, such findings being in words and figures as follows, to-wit:

[fol. 547] 2

That the charges now in force by the Independent Telephone Company for telephone service in the city of Seattle, are as follows, to-wit:

	Rate per month
One party line (Business)	$4 00
Two " " "	3 50
Four " " "	2 50
Extension telephone (Business)	1 00
" bells "	50
Buzzers	50
One party line (residence)	2 50
Two " " "	2 00
Four " " "	1 75
Extension telephone (Residence)	1 00
" bells	50
Buzzers	50

Private Branch Exchange & Intercommunicating

(Business)

Outgoing trunks	$6 50
Incoming trunks	3 00
Two-way trunks	6 00
Stations	1 00

Pay Stations

(Calls, 5¢ each) guarantee	$4 00
Joint users, each	2 00
Extra insertions	50

3

That such rates are not sufficient to enable the defendant Independent Telephone Company to continue the present efficiency of service to its patrons and set aside a proper sum to cover depreciation and replacement, thus enabling it to maintain from operating revenue its capital account unimpaired and to earn a reasonable return on its investment or upon the value of the property used by it in the conduct of its telephone business.

4

That the schedule of rates of the defendant Independent Telephone Company should be so increased as to enable it from its rates, tolls and charges to earn an additional $56,450 for the ensuing year over what it would earn from its present schedule of rates.

[fol. 548] 5

The commission finds that the present market value of the defendant Independent Telephone Company's lines, namely, $1,500,00 is divided according to the investment per station and line connected therewith, as follows:

One party business line	$146 18	per station.
Two " " "	111 26	" "
Four " " "	93 80	" "
Pay stations	156 98	" "
Private branch exchange trunks	146 18	" "
One party residence line	146 18	" "
Two " " "	111 26	" "
Four " " "	93 80	" "

The Commission further finds that approximately 2% of the charges made per station on all lines are not collected.

The commission further finds that from the rates now charged, the different lines and stations pay a return over and above operating expenses on the amount invested, as follows:

One party business stations	2 %
Two " " "	6 1%
Four " " "	3%
Pay stations	11 1%
Private branch exchange trunks	11 4%

That the following stations show a deficit, to-wit:

One party residence stations	1 8%
Two " " "	1 9%
Four " " "	1 3%

The Commission further finds that the annual expense incurred in conducting the different stations is approximately as follows:

One party business stations	$44 09
Two " " "	34 33
Four " " "	29 08
Pay stations	41 38
Private branch exchange trunks	44 09
One party residence stations	32 07
Two " " "	25 68
Four " " "	21 79

6

The Commission finds that the four party business station and line produces an unsatisfactory service; and, as before stated, the said stations at the rates now charged are earning annually but three-tenths of one per cent on the amount invested; that an increase in rates, so that said [fol. 549] lines would earn a reasonable return, would result in the charge being more than the service was reasonable worth, considering the unsatisfactory condition of such service. The Commission therefore finds that four party business lines should be abolished.

7

The Commission finds that the four party residence lines as now developed result in an apparent loss to the company annually of 1.3%; in other words, that the annual gross earnings per each four party residence station is $20.85 per year, while the annual expense connected therewith is $21.79 per year, or a deficit of $1.21 per station.

The Commission further find that the defendant Independent Telephone Company has not properly developed its four party residence lines to a proper state of efficiency, the lines termed "four party" lines having an average of approximately two subscribers per line, whereas a properly developed four party system, in an exchange situate as the Seattle exchange, should have at least an average of three stations per line; that were the four party resi-

dence system developed as the same should be, the present charges would result in a net earning to the said company.

The Commission further finds that the pay stations and private branch exchange and intercommunicating business trunks are paying a reasonable rate at the present time.

8

The Commission finds that the rates charged for business telephones (one party lines) should be increased from $4 per month, the present charge, to $5 per month; that business telephones (two party lines) should be increased from $3.50 per month, the present charge, to $4 per month; that residence telephones (one party lines) should be increased from $2.50 per month, the present charge, to $2.75 per month; that residence telephones (two party lines) should be increased from $2 per month, the present charge, to $2.25 per month; that the charges for all other service should remain as now fixed by the defendant company's tariff.

[fol. 550] The Commission finds that the service rendered by the defendant Independent Telephone Company known as the business service, and furnished by what are known as business lines, is a more valuable service than the service rendered to residents, furnished by what is known as residence lines, and that a higher net return is justified and should be paid to the defendant company from the business telephones than from the residence telephones.

10

The Commission finds that the gross earnings of said defendant company under the advanced rates suggested in these Findings for the following fiscal year would amount to the sum of $531,059.16, assuming the volume of business to remain as in the year 1910; that the operating expenses properly chargeable, including a reasonable amount for depreciation and replacement, would amount to the sum of $399,961.68, leaving net earnings in the sum of $131,097.48.

The Commission finds that this cause should be continued insofar as it affects charges made by the defendant The Pacific Telephone & Telegraph Company.

* * * * * * *

From a consideration of the Findings above set out, and from a consideration of all the evidence introduced in this cause, the Commision does now conclude and order

That the defendant Independent Telephone Company *by* and it is hereby authorized, at its discretion, to discontinue the service known as the "four party business" service; and

It is further authorized and directed to within thirty days from and after the service of this Order upon it to file with the Commission a new tariff, by which the rates on one party business lines shall not exceed $5 per month; on two party business lines $4 per month; on one party [fol. 551] residence lines, $2.75 per month; on two party residence lines $2.25 per month; and that its charges for all other service shall be and remain the same as in its present tariff; that the said tariff shall apply to all service rendered whether evidenced by written contracts or otherwise, and all contracts providing rates different from the schedule to be set out in such tariff hereby ordered filed, are hereby ordered discontinued.

Witness the Public Service Commission of Washington this 29th day of September, 1911.

The Public Service Commission of Washington, by H. A. Fairchild, Chairman. J. C. Lawrence, Commissioner. Jesse S. Jones, Commissioner.

Attest: F. M. Larned, Secretary.

[fol. 552] DEFENDANT'S EXHIBIT No. 32, PACIFIC COMPANY CASE

Certificate

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the within is a full, true and correct copy of the rates of the Pacific Telephone and Telegraph Company taken from its Tariff W. P. S. C. No. 2, effective September 1, 1916, for the services as specified in and for the City of Seattle, King County, Washington, which rates were approved by Order No. 1825, of the Public Service Commission of Washington, dated August 5, 1916.

In witness whereof I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington this 24th day of July, 1924.

Sam L. Crawford, Secretary of the Department of Public Works of Washington. (Seal.)

[fol. 553] Exhibit "A"

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King Co., Washington

Business—Unlimited Service	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.50
Auxiliary Line	6.00	6.00
(Inward Service)	3.00	3.00
Suburban Service (Ten Party Line, see section 2)	3.00	3.00
Extension (with or without bell)	1.00	1.00
Residence—Unlimited Service		
Individual Line	3.00	3.50
Two-Party Line	2.50	3.00
*Four-Party Line	2.25	2.75
Extension (without bell)	.50	.50
" (with bell)	.50	.50
Suburban Service (ten Party Line see Section 3)	2.50	2.50

*Discount of 25¢ if bill is paid at office on or before the tenth day of month.

Primary Rate Area—See Map

Rates are effective inside Primary Rate area unless otherwise indicated. For service outside Primary Rate area see Mileage Rates, Section 3.
Issued September 1, 1916. Effective September 1, 1916.‡
Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

P. H. Coolidge, General Commercial Superintendent.

[fol. 554] W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.00	$5.00	100	$.03
" "	6.00	6.00	150	.025
Auxuliary Line	2.50	2.50	...	....
Extension (with or without bell)	.75	.75	...	....

Residence—Measured Service

Individual Line	....	....	...	....
Extension (Without bell) — m	....	....	...	....
Extension (With Bell)	....	....	...	....

	Rate per month		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	$.15	3	$.035
Extension (with or without bell) Per Month	1.00	1.00	..	....

Residence—Coin Box Service

Individual Line	....	....	...	....
Extension (without bell) Per month	....	....	...	....
Extension (With bell) per month	....	....	...	....

Issued September 1, 1916. Effective September 1, 1916.‡
Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

P. H. Coolidge, General Commercial Superintendent.

‡ In accordance with Order No. 1825 of the Public Service Commission of Washington.

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[fol. 555] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Private Branch Exchange Service

Exchange: Seattle, King County, Washington

Business, Commercial—Unlimited Service

	Rate per month
Switchboard cord, with battery power, ringing circuit and switchboard telephone for each position, per position	$5 00
First bothway trunk line	9 50
Each additional bothway trunk line	7 15
Each incoming trunk line	3 00
Each outgoing trunk line	7 50
Each station, primary or extension, wall or desk set (See Mileage rates, Section 3)	1 00
Each two (2) position order table equipped with two (2) complete telephone sets	4 00
Each line from order table to private branch exchange switchboard	1 00

Minimum installation: Two (2) trunk lines and four (4) stations excluding switchboard telephones. Where order table service is furnished the minimum installation for that service is one two-position order receiving table and four (4) lines to the switchboard.

The order table must be in premises in which switchboard is located and is available only in exchanges having common battery service.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate area, see mileage Rates, Section 3.

Issued September 1, 1916. Effective September 1, 1916.*

Cancels and supersedes Exchange Rate Schedule effective January 1, 1911.

P. H. Coolidge, General Commercial Superintendent

* In accordance with Order No. 1825 of the Public Service Commission of Washington.

[fol. 556] W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Private Branch Exchange Service

Exchange: Seattle, King County, Washington

Business Hotel—Unlimited Service

	Rate per month	
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2 00	
Additional switchboard equipment for each group of 5 lines or less	20	
First bothway trunk line	9 50	
Each additional bothway trunk line	7 15	
Each incoming trunk line	3 00	
Each outgoing trunk line	7 50	
	Wall set	Desk set
Each station, primary or extension, not in guest rooms. (See Mileage Rates, Section 3)	$1 00	$1 00
Each station, primary or extension, in guest rooms 1 to 10 inclusive	50	75
11 to 20 inclusive	45	70
21 to 35 inclusive	40	65
36 to 50 inclusive	35	60
Over 50	25	50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage rates, section 3.

Issued September 1, 1916. Effective September 1, 1916.‡

‡ In accordance with Order No. 1825 of the Public Service Commission of Washington.

Cancels and supersedes Exchange Rate Schedule effective April 12, 1914.

P. H. Coolidge, General Commercial Superintendent.

[fol. 557] Defendant's Exhibit No. 33, Pacific Company Case

Certificate

State of Washington,
County of Thurston, ss:

I hereby certify that the within is a full, true and correct copy of the original application of the Pacific Telephone and Telegraph Company for an order of the Public Service Commission permitting it to continue in force the rates, charges, rules and regulations of the Postmaster General; letter of said company marked "Exhibit A" attached to said application and referred to therein; and less than statutory Order No. 3158 dated August 8, 1919, granting said applicant leave to continue in effect such rates, charges, rules and regulations.

In witness whereof I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington this 24th day of July, 1924.

Sam L. Crawford, Secretary of the Department of Public Works of Washington. (Seal.)

[fol. 558] The Public Service Commission of Washington

Application No. 1

In the Matter of Application of The Pacific Telephone and Telegraph Company to Waive Thirty Days' Statutory Notice

Comes now the petitioner herein and shows the Commission as follows:

(1) That it desires to continue in force the petitioner's rules, rates, charges and regulations in effect July 31st, 1919, now on file with the Public Service Commission of

Washington (or attached hereto), the same having been authorized by the Postmaster General and as of record in case No. 4747 before the Public Service Commission of Washington and as our letter of August 5th, 1919, attached hereto, marked "A."

(2) That the reason and cause for asking a waiver of the thirty days statutory notice is that the petitioner's property having been returned to it by the Postmaster General and the Attorney General of the State of Washington having advised that the intra state rate in effect July 31st, 1918 would automatically become re-effective upon such return in which case serious disturbance, loss and injury to the petitioner's business would result and petitioner having been without opportunity prior to August 1st, 1919, to file a new tariff giving the required thirty days statutory notice, this application is filed for relief. ‡ (See note.)

(Signed) (Name of petitioner:) The Pacific Telephone and Telegraph Company, by (Name of officer and title:) James T. Shaw, Attorney, by A. E. Boyles.

STATE OF WASHINGTON,
County of Thurston, ss:

I, A. E. Boyle, being first duly sworn, deposes and says that I am an authorized representative of the Pacific Telephone and Telegraph Company petitioner herein; that I have read the foregoing application, and have knowledge of the facts therein stated and the same are true as I verily believe.

(Signed) A. E. Boyles.

Subscribed and sworn to before me this 8th day of Aug., 1919. (Signed) W. J. Foster, Notary Public in and for the State of Washington. (Notarial Seal.)

‡ This application is made with the distinct understanding on the part of the petitioner that in the event any of the rates, rules, regulations or charges herein referred to are challenged, the burden of proof as to the justness, reasonableness and sufficiency thereof shall be and remain with this petitioner herein.

THE PUBLIC SERVICE COMMISSION OF WASHINGTON

Order No. 3158

The Commission having considered the foregoing application, it is ordered that leave be granted petitioner to continue in effect the rates, rules and regulations above named, effective August 1st, 1919, until further ordered by the Commission.

Dated Olympia, Washington, August 8th, 1919.

(Signed) The Public Service Commission of Washington. E. F. Blaine, A. A. Lewis, Frank R. Spinning.

Attest: J. H. Brown, Secy.

[fol. 559] The Pacific Telephone and Telegraph Company

"A" Part of Order 3158

Portland, August 5, 1919.

The Public Service Commission of Washington, Olympia, Washington.

GENTLEMEN: Under date of November 4th we filed with your Commission exchange rates, rules and regulations for each and every exchange in the State of Washington. This exchange tariff is numbered W. P. S. C. No. 2 effective November 15, 1918. Under date of December 7, 1918 we filed a copy of Bulletin No. 15 issued by the Postmaster General under date of November 18, 1918, and effective December 1, 1918, being a modification of Service Connection Charges and Moving Charges effective under the Postmaster General's Order No. 1931 and Bulletin No. 8. On January 2, 1919, we filed exchange rate schedule covering change of name.

The exchange tariffs approved by and filed as hereinabove set out under the direction of the Postmaster General and under your Commission's order dated February 20, 1919, in Case No. 4747, effective on and after March 1, 1919, and the toll and telegraph rates as enumerated in our letter of July 25th, 1919, together with a toll and telegraph tariff in complete form forwarded to your Commission with our letter of July 25, 1919, we now specifically refer to and desig-

nate as the official filing of rates under which The Pacific Telephone and Telegraph Company is operating in the State of Washington as required by statute.

Yours truly, The Pacific Telephone and Telegraph Company. H. D. Pillsbury, Vice President and General Attorney, by James T. Shaw.

[fol. 560] DEFENDANT'S EXHIBIT No. 35, PACIFIC COMPANY CASE

STATE OF WASHINGTON,
County of Thurston, ss:

I hereby certify that the within is a full, true and correct copy of the rates of the Pacific Telephone and Telegraph Company taken from its tariff W. P. S. C. No. 2, effective March 1, 1919, for the service as specified in and for the City of Seattle, King County, Washington, and which were continued in effect after July 31, 1919 by Order No. 3158 of the Department of Public Works of Washington, dated August 8, 1919.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Department of Public Works of Washington this 24th day of July, 1924.

Sam L. Crawford, Secretary of the Department of Public Works of Washington. (Seal.)

[fol. 561] EXHIBIT "B"

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Extension (with or without bell)	1.00	1.00
Suburban Service—Ten Party Line (See section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.75	4.00
Two Party Line	3.00	3.25
Four Party Line	2.50	2.75
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Ten Party Line (See section 3)	3.00	3.25

Primary Rate Area. See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate area, see mileage Rates, Section 3.

Issued November 4, 1918. Effective March 1st, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1st, 1916.

P. H. Coolidge, General Commercial Supt.

[64.502] Exhibit "H"

W. P. S. C. No. 2, Section 1

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Exchange: Seattle, King County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$ 6.75	150	$ .04
Auxiliary Line	2.00	2.25		
Extension (with or without bell)	.75	.75		

Business—Coin Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$ .15	$ .X	3	$ .05
Extension (with or without bell) per month	1.00	1.00		

Residence—Coin Box Service

Individual Line	
Extension (without bell) per month	
Extension (with bell) per month	

Issued Nov. 4, 1918. Effective March 1, 1919.
Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. H. Coolidge, General Commercial Superintendent.

X.25¢ per month additional.

[fol. 563] Exhibit "B"

W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Private Branch Exchange Service

Business Commercial—Unlimited Service

	Rate per month
Switchboard, cord, with battery power, ringing circuit and switchboard telephone for each position, per position	$5 00
First bothway trunk line—Individual business rate plus $2.00 per month	
Each additional bothway trunk line—Rate for first bothway trunk line less 25%	
Each incoming trunk line—individual business rate less 20% minimum $4.00 per month	
Each station, primary or extension, wall or desk set (see mileage rates, Section 3)	1 00
Each two (2) position order table equipped with two (2) complete telephone sets	4 00
Each line from order table to private branch exchange switchboard	1 00

Minimum installation: Two (2) trunk lines and four (4) stations, excluding switchboard telephones. Where order table service is furnished the minimum installation for that service is one two position order receiving table and four (4) lines to the switchboard.

The order table must be in premises in which switchboard is located and is available only in exchange having common battery service.

Rates are effective inside Primary Rate Area, unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued Nov. 4, 1918. Effective March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916

P. H. Coolidge, General Commercial Superintendent.

[fol. 564] Exhibit "B"

W. P. S. C. No. 2, Section 2

The Pacific Telephone and Telegraph Company Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2 00
Additional switchboard equipment for each group of 5 lines or less	00
First bothway trunk line—Individual business rate plus $2.00 per month	
Each additional bothway trunk line—Rate for first bothway trunk line less 25%	
Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month	

	Wall set	Desk set
Each Station, primary or extension, not in Guest rooms (See Mileage Rates, Section 3)	$1 00	$1 00
Each Station, primary or extension, in guest rooms 1 to 10 inclusive	50	75
11 to 20 inclusive	45	70
21 to 35 "	40	65
36 to 50 "	35	60
Over 50	25	50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscribers' requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary rate Area, see Mileage Rates, Section 3.

Issued Nov. 4, 1918. Effective March 1, 1919.

Cancels and supersedes Exchange Rate Schedule effective September 1, 1916.

P. C. Coolidge, General Commercial Superintendent.

[fol. 565] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed September 20, 1926

To the Clerk of the above entitled court:

Please make and certify on appeal to the Supreme Court of the United States a record which includes the following files, to wit:

1. Amended and supplemental bill of complaint and exhibits attached thereto;
2. Answer to amended and supplemental bill of complaint and exhibits attached thereto;
3. Report of John T. Condon, Special Master in Chancery;
4. Defendants' Exceptions to Master's Report;
5. Opinion of Three Judges, filed April 22, 1926;
6. Decree of May 18, 1926;
7. Order of Substitution;
8. Assignment of Errors;
9. Petition for Allowance of Appeal;
10. Order Allowing Appeal;
11. Order Fixing Amount of Bond on Appeal;

[fol. 566] 12. Bond on Appeal;

13. Citation;
14. Acceptance of Service;
15. The following from the transcript of testimony taken at the hearing before the Master in June, 1925: From line 7 on page 1908 to line 23 on page 1936, incl.; from line 20 on page 1937 to end of page 1938, incl.; from line 26 on page 1939 to line 4 on page 1944, incl.; from line 13 on page 2037 to line 12 on page 2039, incl.;
16. Plaintiff's Exhibit No. 101, Ordinance No. 4985, City of Seattle;
17. Plaintiff's Exhibit No. 102, Resolution No. 7495, City of Seattle;

18. Defendant's Exhibit No. 12, Certified copy of opinion and Findings of Fact of the Public Service Commission of Washington in Causes Nos. 1810 and 1825;

19. Defendants' Exhibit No. 30, Transfer of franchise granted under Ordinance No. 6498, City of Seattle, by The Pacific Telephone and Telegraph Company to F. H. Crosby;

20. Defendants' Exhibit No. 31, Findings of Fact and Order, Cause No. 31 of the Railroad Commission of Washington;

21. Defendants' Exhibit No. 32, Certified copy of rate sheets from Tariff W. P. S. C. No. 2;

22. Defendants' Exhibit No. 33, Certified copy of application to the Public Service Commission;

23. Defendants' Exhibit No. 35, Certified copy of rate sheets taken from Tariff W. P. S. C. No. 2;

24. Plaintiff's Exhibit #100 Order Public Service Commission in Cause 1825;

25. This praecipe and acknowledgment of service attached thereto.

Omit all captions except on amended and supplemental complaint.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants.

Due, regular and timely service of the foregoing praecipe is hereby acknowledged this 16 day of September, 1926.

Otto B. Rupp, Post & Russell, Pillsbury, Madison & Sutro, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 567] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 568] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF THE RECORD TO BE PRINTED—Filed December 13, 1926

I

That by virtue of ordinance No. 6498 of the city of Seattle, passed on the 23rd day of January, 1901, and by virtue of the subsequent assignment to the appellee of the franchise granted by said ordinance, and the ratification of said assignment by the city of Seattle in its ordinance No. 7143, there was created a valid franchise contract between the city of Seattle and the appellee; that section 7 of said franchise contract prescribed maximum residence and business telephone rates for the appellee in the city of Seattle.

II

That by virtue of ordinance No. 2522 of the city of Tacoma, effective on the 15th day of December, 1905, and by virtue of the subsequent assignment to the appellee of the franchise granted by said ordinance and the ratification of said assignment by the city of Tacoma by its ordinance No. 6319 on the 9th day of February, 1916, there was created a valid franchise contract between the city of Tacoma and the appellee; that section 13 of said franchise contract pre-
[fol. 569] scribed maximum residence and business rates for unlimited service by the appellee in the city of Tacoma.

III

That by the public service act of the state of Washington, being chapter 117, Laws of 1911, there was created a public service commission, and by section 43 of said act, being section 10379, Remington's Compiled Statutes of the state of Washington, said public service commission is authorized, in its discretion, to direct by order that any contract or contracts shall be terminated by the telephone company party thereto, and thereupon such contract or contracts shall be terminated as and when directed by such order.

IV

That pursuant to the authority conferred upon the public service commission of Washington by said statutes, said commission, by its order dated August 5, 1916, authorized the rates prescribed by said Seattle and Tacoma franchise contracts to be increased as and when by such order directed.

V

That the public service commission of Washington, by its order of February 13, 1919, attempted to terminate said Seattle and Tacoma franchise contracts; that said attempted termination was declared void by the supreme court of the state of Washington in the case of State ex rel. Seattle v. Public Service Commission, 110 Wash. 130, 188 Pac. 7.

VI

That the public service commission of Washington, by its purported and void order of August 8, 1919 (defendant's exhibit No. 33, Answer to Amended and Supplemental Complaint, page 77), entered without jurisdiction of the parties or subject matter, pretended to grant appellee leave to continue in effect "war rates" previously authorized by the Postmaster General during the period of "Federal wire [fol. 570] control;" said purported and void order of August 8, 1919, made no reference whatsoever to the said franchise rates, as previously modified by the said order of August 5, 1916; that said purported and void order of August 8, 1919, was made without the jurisdictional filing of a schedule of rates, or the jurisdictional service of notice, or the jurisdictional filing and service of a complaint, or the jurisdictional holding o fa hearing, as required by law, and was therefore illegal, null and void.

VII

That the department of public works, the successor in interest to the public service commission, by its order of March 31, 1923, denying the application of appellee for increased rates, made no reference whatsoever to the said

Seattle and Tacoma franchise rates, as amended by the said 1916 order.

VIII

That neither the public service commission of Washington, nor its successor, the department of public works of Washington, has ever made any order expressly attempting to terminate any of the franchise rates between the appellee and the city of Seattle or the city of Tacoma, since its said order of August 5, 1916.

IX

That at the time of the entry by the department of public works of its order of March 31, 1923, and at the time of the commencement of this suit by appellee, there existed a valid franchise contract between the appellee and the city of Seattle for the furnishing of residence and business telephone service at maximum rates less than the rates contained in the schedule filed by the appellee with the department of public works and attached to the amended and supplemental bill of complaint as exhibit "A," and less than the rates placed in effect by the interlocutory injunction herein.

[fol. 571] X

That at the time of the entry by the department of public works of its order of March 31, 1923, and at the time of the commencement of this suit by appellee, there existed a valid franchise contract between the appellee and the city of Tacoma for the furnishing of unlimited business telephone service at a maximum rate less than the rate contained in the schedule filed by the appellee with the department of public works and attached to the amended and supplemental bill of complaint as exhibit "A," and said franchise contract contained maximum rates for unlimited business and residence telephone service less than the rates for such service placed in effect by the interlocutory injunction herein.

XI

That the true meaning of section 10379, Remington's Compiled Statutes, when it uses the language that "thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order," is that the defendants and their predecessors in office had the power and authority to modify said Seattle and Tacoma franchise contracts in respect to rates, but that such franchise contracts, as modified, continued in full force and effect.

XII

That the district court, in its opinion in this case, held that the purported order of August 8, 1919, terminated the Seattle and Tacoma franchise contracts for all purposes, following an alleged construction of the statute by the supreme court of the state of Washington, and appellants contend that the district court has misconstrued the decision of the state court, and that, in any event, the district court upon an alleged Federal question should have exercised its independent judgment.

[fol. 572]

XIII

That by virtue of the existence of valid franchise contracts between the plaintiff and the city of Seattle and the city of Tacoma at the commencement of this litigation, the plaintiff was bound by said contracts, no question of confiscation is presented by this record, no Federal question arises, and the Federal Court is without jurisdiction.

For the consideration of the foregoing points, appellants think that the entire record is necessary, with the following exceptions, and we therefore designate that all of said record except as hereinafter noted shall be printed:

(1) Of the report of John T. Condon, special master in chancery, appearing on pages 251 to 392 of the typewritten record, there shall be printed only that portion with reference to "franchise contract as to rates" on pages 378 to 382, inclusive, of said record.

(2) Of the defendants' exceptions to the master's report, appearing at pages 393 to 409 of the typewritten record, there shall be printed only exception No. 33, at page 407, and exceptions Nos. 36, 37 and 38, at pages 408 to 409, inclusive, of the record.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Appellants. Thos. J. L. Kennedy Ray Dunett, of Counsel.

[fol. 573] Service of the foregoing statement of points intended to be relied upon by appellants and designation of parts of the record to be printed acknowledged this 7th day of December, 1926.

H. B. Rupp, Post & Russell, Pillsbury, Madison & Sutro, Solicitors for Appellee.

[fols. 574-577] [File endorsement omitted.]

Endorsed on cover: File No. 32,335. W. Washington D. C. U. S. Term No. 768. John C. Denney, as Director of Public Works of Washington; O. O. Calderhead, as Supervisor of Transportation of Washington, and C. Rea Moore, etc., et al., appellants, vs. The Pacific Telephone and Telegraph Company. Filed December 13th, 1926. File No. 32,335.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

No. 150.

JOHN C. DENNY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

v.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Respondent.

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANTS

JOHN H. DUNBAR,
Attorney General of the State of Washington,

H. C. BRODIE,
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The Pacific Company's lawful maximum exchange rates in the cities of Seattle and Tacoma, being specified in existing franchise contracts, there is no confiscation as a matter of law and no constitutional right is invaded in requiring the Pacific Company to observe and comply with the same, and therefore, the Federal Court is without jurisdiction to inquire into such rates in respect to the cities of Seattle and Tacoma 22

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

No. 150.

JOHN C. DENNY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellants,

v.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Respondent.

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

This is a direct appeal under Section 266 of the Judicial Code from the judgment and decree (R. 193) of the District Court of the United States, for

the Western District of Washington, Southern Division, signed May 8, 1926, and filed May 19, 1926. The decision of the trial court was entered April 22, 1926, (*Pacific Tel. and Tel. Co. v. Whitcomb et al.*, 12 Fed. 2nd, 279).

The scope of this brief is limited to a discussion of such assignments of error appearing in the record as relate to the franchise relations between respondent, The Pacific Telephone and Telegraph Company, and the cities of Seattle and Tacoma. Throughout the brief the City of Seattle will be referred to as "Seattle," the City of Tacoma as "Tacoma," and respondent The Pacific Telephone and Telegraph Company, will be referred to as the "Pacific Company."

The pertinent facts in the case are briefly as follows:

By Ordinance No. 4985, approved July 19, 1898, Seattle granted to the Sunset Telephone and Telegraph Company a franchise to continue to maintain and operate its then existing telephone and telegraph system within the City, and to erect, maintain and operate such additional poles, wires and other apparatus upon the streets of the city as might be necessary for its telephone and telegraph business, for a period of twenty-five (25) years (R. 250). This franchise, commonly known as the "Sunset Franchise," was assigned to the Pacific Company on January 8, 1917 (R. 222), and expired on July 19, 1923 (R. 220).

By Ordinance No. 6498, effective January 21, 1901, Seattle granted to John S. McGroaty and George C. Blanker a franchise to lay down, construct and erect, maintain and operate telephone lines, conduits, facilities and equipment in all of the public streets of the city for a period of twenty-five (25) years (R. 140). Said franchise, commonly known as the "Independent Franchise," was duly accepted by the grantees named therein, and was subsequently assigned, by sundry mesne conveyances, to the Pacific Company (R. 210, 211). Said assignment was ratified by Ordinance No. 7143 of Seattle (R. 149). At the time of the commencement of this suit said franchise had not expired nor had it expired at the time of trial. Section 7 of said Ordinance No. 6498 is in words and figures as follows, to-wit:

"That the grantees herein, their successors and assigns, shall not, during the continuance of this franchise, charge or receive for rent, or for the use of each telephone furnished by the grantees, their successors and assigns, under this franchise any greater rates or sums than the following, to-wit: For a business telephone (one party line) Four Dollars ($4.00) per month; for a business telephone (two party lines) three and 50/100 Dollars ($3.50) per month; for a residence telephone (one party line) two and 50/100 Dollars ($2.50) per month; for a residence telephone (two party line) Two Dollars ($2.00) per month; the foregoing rates shall be the maximum rates to be charged and received for such telephones."

Subsequent to the granting of said Independent Franchise, to-wit: On the 29th day of September,

1911, the Public Service Commission of Washington, a rate regulating body established by state law, made and entered in its Cause No. 31 an order authorizing certain of the rates prescribed by Section 7 of said Ordinance No. 6498 to be increased as follows, and not to exceed the following amounts: Business telephones (one party) $4.00 to $5.00 per month; business telephones (two party), $3.50 to $4.00 per month; residence telephones (one party), $2.50 to $2.75 per month; and residence telephones (two party), $2.00 to $2.25 per month; and directed that all other charges should remain as fixed by the tariff on file conforming to the rates prescribed in said Section 7 (R. 273, 279).

On August 5, 1916, the said Public Service Commission in its Cause No. 1825, made and entered an order authorizing certain of the rates prescribed by said Section 7 of Ordinance No. 6498 to be increased as and when by said order directed, not to exceed certain therein specified amounts (R. 223, 249, 256), which said increased amounts and rates were, on the first day of September, 1916, embodied in a tariff filed with the Public Service Commission (R. 280).

The said unchanged franchise rates, and those modified by the above-mentioned orders of December 29, 1911, and August 5, 1916, are less than the rates complained of by the Pacific Company in this case.

In addition to the above-quoted Section 7, providing rates on behalf of the public, the said ordinance and franchise contains certain other covenants,

terms and conditions intended for the benefit of Seattle in its corporate capacity, as distinguished from the interests of the public. Said covenants, terms and conditions constitute a part of the consideration furnished by the franchise holder for the use of Seattle's streets under said franchise. Among these covenants, terms and conditions are provisions requiring that the franchise holder shall from time to time place its telephone equipment and system underground within such areas as may be specified by the City Council, and shall in all cases where excavations are made in public streets restore the same at its own expense to good condition for travel and give bonds for such purpose. It is further provided in said ordinance and franchise that the franchise holder shall hold and save Seattle harmless from, and indemnify it against, any and all damages arising out of the negligence of the franchise holder in respect to its equipment and facilities in the city's streets, and shall, at its own expense, move and remove its wires, facilities and equipment in the public streets from time to time as such moving and removing may be required by reason of the improvement of the city's streets, or the moving of buildings across the same, and shall furnish and maintain certain therein specified free telephones for the use of Seattle in its corporate capacity, and permit Seattle to maintain all wires which it may require for fire alarm or police telephone purposes on all the various poles and any and all the various underground conduits maintained

by the franchise holder. At the time of the hearing before the Special Master in this case the Pacific Company was furnishing free service to Seattle according to the terms of the Independent Franchise (R. 219).

On the 3rd day of May, 1923, and subsequent to the commencement of this suit, the Pacific Company sought to alienate the Independent Franchise, so as to release the property held thereunder from the liabilities and obligations incurred with respect thereto, by executing a purported assignment of said franchise to one F. H. Crosby, of San Francisco, California, without transferring therewith the franchise property (Defendant's Exhibit No. 30). The said Crosby is not the owner, holder or operator of any telephone or telegraph system or equipment in Seattle (R. 213, 219).

By Ordinance No. 2522, passed Dec. 13, 1905, Tacoma granted to Edward E. Webster a franchise to lay and maintain underground conduits, cables and wires and to construct necessary manholes, make house connections and to erect poles and thereon fasten wires in the streets and alleys, and to operate an automatic telephone system and telegraph system and business in the city of Tacoma (R. 153) for a period of twenty-five years. This franchise was duly accepted by Webster, and subsequently by various assignments was transferred to the Pacific Company, and Tacoma, by Ordinance No. 6319 passed February 9, 1916, gave its consent to such transfer to the

Pacific Company and provided that said company should take such franchise subject to all the terms and conditions of said ordinance No. 2522 (R. 165). Section 13 of said Ordinance No. 2522 named maximum rates which might be charged for telephone service in Tacoma (R. 158). This franchise maximum for business telephones was exceeded by the rates which were put in effect by the Postmaster General during the period of Federal control, and which rates the Public Service Commission permitted the Pacific Company to continue in effect in Tacoma by the order of August 8, 1919, hereinafter referred to.

On August 1, 1918, the Postmaster General of the United States took charge of the telephone lines of the Pacific Company and retained control of the same until August 1, 1919; and during such period of Federal control the telephone rates were materially increased in both Seattle and Tacoma. During the period of such Federal control the Public Service Commission on February 13, 1919, made an order establishing the rates fixed by the Postmaster General as the rates of the Pacific Company in the State of Washington and specifically directed that all contracts in conflict with Postmaster General rates be terminated. This order was reviewed by Seattle and Tacoma and it was held by the State Supreme Court that the order was void because the Public Service Commission did not have jurisdiction during the period of Federal control. *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 130; 188 Pac.

7. No order has been made by the Public Service Commission since that time in which it expressly directed a termination of franchise rates.

On or about the eighth day of August, 1919, the Pacific Company filed with the Public Service Commission an application petitioning said Commission to continue in force on less than statutory notice the rates theretofore authorized by the Postmaster General during the period of Federal control. This application was accompanied by a certain letter written by the Pacific Company to said Commission bearing date of August 5, 1919, (R. 201, 284).

On August 8, 1919, the Public Service Commission entered an order *permitting* the Pacific Company to continue to charge the "war rates" prescribed by the Postmaster General (R. 287), which rates would otherwise have become ineffective, under the Congressional resolution terminating Federal control four months from the date of the return of the wires to the owners, to-wit: Four months from August 1, 1919, (R. 286). No statutory complaint was filed, no statutory notice was given, nor was any hearing had or evidence taken upon the so-called petition, nor was a conforming statutory tariff filed. In other words there was not even a pretense of compliance with the mandatory statutory conditions precedent to the entry of a jurisdictional order by the commission.

On March 31, 1923, the Department of Public Works (successor to the Public Service Commission)

entered an order refusing to change the rates continued in effect by said order of August 8, 1919 (R. 49, 69). A few days later this suit was commenced by the Pacific Company, alleging that said rate order promulgated by the Department was confiscatory of its property and consequently in violation of the Federal Constitution. The case was referred to a special master, who concluded that the effect of enforcing the order of March 31, 1923, would be to confiscate the property of the Company and recommended that a permanent injunction be granted restraining the Department from putting such order into effect. Pursuant to Section 266 of the Judicial Code, the case was then heard before a three judge court upon exceptions to the report of the special master. The said court in its decree, filed May 19, 1926, overruled the exceptions to the report of the special master and granted a permanent injunction (R. 193). From said decree this appeal is taken.

ASSIGNMENTS OF ERROR.

This appeal is based upon the following Assignments of Error (R. 196):

I.

The court erred in making and entering the decree of May 19, 1926.

II.

The court erred in overruling defendant's exception No. 33 to the report of the master. Said Exception No. 33 is as follows (R. 173):

"They except to the conclusion of the master (pp. 120, 121; p. 135 printed copy), that the order of the Department of Public Works fixing new rates, terminated instead of amending the franchise rates, for the reason that the same is contrary to law in that it fails to give proper effect to the state statute and assumes jurisdiction for the Federal Court over rates which can only be further modified by the Department of Public Works in the manner provided by statute."

III.

The court erred in overruling defendant's Exception No. 37 to the report of the Master. Said Exception No. 37 is as follows (R. 174):

"They except to the conclusion of the master (p. 126; p. 143 printed copy), that the temporary injunction heretofore granted in this case be made permanent for the reason that the same is contrary to the law and the evidence, for the specific reasons assigned in preceding exceptions."

IV.

The court erred in not finding that the Pacific Company up to and including January 21, 1926, and

ever since the beginning of this action, was operating its exchange in the City of Seattle *under a valid franchise contract* which prescribed a maximum schedule of rates for both business and residence telephones, and which unchanged franchise rates, and those modified by the orders of the defendants and their predecessors in office, were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants do not deprive the Pacific Company of its property without due process of law, and do not deny to said Pacific Company the equal protection of the law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

V.

The court erred in not finding that the Pacific Company is now, and has been ever since the beginning of this action, operating its exchange in Tacoma under a valid franchise contract which prescribed a maximum schedule of rates for both business and residence telephones and which franchise rates, as modified by the orders of the defendants and their predecessors in office were less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and, for that reason, the orders of the predecessors in office of the defendants did not deprive the Pacific Company of its property without due process of law, and did not deny to the Pacific Company the equal pro-

tection of law, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States.

VI.

The court erred in finding that the order of the Department of Public Works, referred to in defendant's Exception No. 33, terminated the franchise contract between the Pacific Company and Seattle, for the reason that said order did not attempt in any manner to change the then existing franchise rates; nor had the commission by compliance with the statute (Rem. Comp. Stat. of Wash., Sec. 10391; 10422; 10423; 10424) acquired jurisdiction so to do.

VII.

The court erred in finding that the order of the Department of Public Works referred to in Defendant's Exception No. 33 terminated the franchise contract between the Pacific Company and Tacoma, for the reason that said order did not attempt in any manner to change the then existing franchise rates; nor had the commission by compliance with the statute, (Rem. Comp. Stat. of Wash., Sec. 10391; 10422; 10423; 10424) acquired jurisdiction so to do.

VIII.

The court erred in holding that Section 10379 of Rem. Comp. Stat. of the State of Washington authorized the defendant's predecessors in office to terminate the franchise contract existing between the Pacific Company and Seattle, because of an alleged construction of said section by the Supreme Court

of the State of Washington in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107; 205 Pac. 3.

IX.

The court erred in holding that Section 10379, of Remington's Compiled Statutes of the State of Washington, authorized the defendant's predecessors in office to terminate the franchise contract existing between plaintiff and the City of Tacoma because of an alleged construction of said section by the Supreme Court of the State of Washington in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107; 205 Pac. 3.

X.

The court erred in holding that the alleged construction of said section by the Supreme Court of the State of Washington was binding upon it, and in refusing to exercise an independent judgment in construing said section.

The points intended to be relied upon are set forth at page 293 of the record, there being thirteen such points, all of which may be presented and discussed under a single heading.

ARGUMENT.

THE PACIFIC COMPANY'S LAWFUL MAXIMUM EXCHANGE RATES IN THE CITIES OF SEATTLE AND TACOMA BEING SPECIFIED IN EXISTING FRANCHISE CONTRACTS, THERE IS NO CONFISCATION AS A MATTER OF LAW AND NO CONSTITUTIONAL RIGHT IS INVADED IN REQUIRING THE PACIFIC COMPANY TO OBSERVE AND COMPLY WITH THE SAME, AND, THEREFORE, THE FEDERAL COURT IS WITHOUT JURISDICTION TO INQUIRE INTO SUCH RATES IN RESPECT TO THE CITIES OF SEATTLE AND TACOMA.

The state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation, and the fact that rates fixed by such contract may become confiscatory does not affect the validity of the agreement.

St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352; 68 L. Ed. 1050;

Columbus Ry. Power & Light Co. v. City of Columbus, 249 U. S. 399; 63 L. Ed. 669.

The State of Washington has conferred power upon its municipalities to make such contracts. *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 200; 172 Pac. 899. However, by the Public Service Commission law of 1911, provision was made whereby the Public Service Commission might relieve either party to such a contract so far as the contract affected rates or service of the public utility. Section 43 of the Public Service Commission Law, being Section 10379 Rem. Comp. Stat. of Washington,

relates particularly to existing contracts of telephone companies, and is as follows:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line equipment or service under any contract or contracts in force at the date this act takes effect, or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however,* that the commission shall have the power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company *as and when directed by such order.*

No effect can be given to the words "*as and when,*" appearing in the above-quoted statute, unless the statute is held to mean that the franchise contract still remains in existence, save as altered and modified by the order of the Commission or Department.

Every word of the above-quoted statute must be given effect, and no single word may be disregarded.

25 R. C. L. 1004;
Lawrence v. Allen, 7 Howard, 785;
Bend v. Hoyt, 13 Peters, 263.
Montclair Township v. Russell, 107 U. S. 147;
Postmaster General of the U. S. v. Early, 12 Wheat. 136.

It will be noted that under the above-quoted statute it is wholly discretionary on the part of the Commission as to whether or not it will change such

franchise contract. If the Commission, or its successor, the Department of Public Works, did not see fit to alter the contract between the Pacific Company and the respective cities, the Company would have had no relief against alleged confiscatory rates. This situation is aptly expressed by the United States Supreme Court in the following language from *Arkansas Gas Co. v. Railroad Comm.*, 261 U. S. 379; 67 L. Ed. 705, 710:

"The question of whether, in the absence of the statute—it being made to appear that the stipulated consideration was grossly inadequate—the commission, under the circumstances disclosed by the record, would have been under a duty to fix gas rates in contravention of the contracts, may be put aside with brief consideration. While a state may exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts (Union Goods Co. v. Ga. Pub. Service Corp., 248 U. S. 372, 375; 63 L. Ed. 309, 311; 9 A. L. R. 1420; P. U. R. 1919 C 60; 39 Sup. Ct. Rep. 117; Producers Transportation Co. v. Railroad Comm., 251 U. S. 228, 232; 64 L. Ed. 239, 242; P. U. R. 1920 C 574; 40 Sup. Ct. Rep. 131), there is quite clearly no principle which imposes an obligation to do so merely to relieve a contracting party from the burdens of an improvident undertaking. The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairment clause of the Constitution. The power does not exist *per se*. It is the invasion of the public interest which justifies it, and, at the same time, conditions its exercise."

By virtue of Ordinance No. 6498 of Seattle, passed on the twenty-third day of April, 1901, and by virtue of the subsequent assignment to the Pacific Company of the franchise granted by said ordinance, and the ratification of said assignment by the City in its Ordinance No. 7143, there was created a valid franchise contract between the City and the Company. The unchanged franchise rates and those subsequently *modified* by orders of the Commission, are less than the rates of which the Pacific Company complains in this case.

By virtue of Ordinance No. 2522 of the City of Tacoma, passed December 13, 1905, and the subsequent transfer thereof to the Pacific Company and the ratification of such transfer by Ordinance No. 6319, passed February 9, 1916, there was created a valid franchise contract between Tacoma and the Pacific Company. The maximum franchise rates for business telephones within the city of Tacoma in such franchise contract, as subsequently *modified* by orders of the Public Service Commission and the Department of Public Works, are less than the rates of which the Pacific Company complains in this case.

It will be noted that the orders made by the Public Service Commission and its successor, the Department of Public Works, authorizing increases of telephone rates in the cities of Seattle and Tacoma have been purely *permissive*. It is true that the Public Service Commission by its order of February 13, 1919, *attempted* to terminate the Seattle and

Tacoma franchise contracts, but this attempted termination was declared void by the State Supreme Court in the case of *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 130; 188 Pac. 7.

The trial court, in affirming the Report of the Special Master, erroneously held that the order of the Public Service Commission (now Department of Public Works) entered on August 8, 1919, after the termination of Federal control of the properties, terminated the franchise contract between the Pacific Company and the cities of Seattle and Tacoma. Said order of August 8, 1919, however, merely *permits* the Company to continue to charge the "war rates" prescribed by the Postmaster General. The rates permitted to be charged by the order of August 8, 1919, were continued in effect by the order of March 31, 1923, which order is the basis of this suit. Said order of August 8, 1919, made no reference whatsoever to the said franchise rates as previously modified by the order of August 5, 1916. In other words, said order was, as a matter of law, and by its own terms clearly *permissive*. No complaint was filed, as required by statute, nor was a hearing had upon the so-called petition, both of which are conditions precedent, under the Public Service Commission Law, to the exercise of the police power in the matter of termination of contracts. (Rem. Comp. Stat. of Wash., §§ 10379; 10391; 10422; 10423; 10424. See Appendix). In fact no conforming tariff was even filed. This order and the *petition* of the Pacific Company

to have such rates continued in effect, will be found in Exhibit "C" to the Answer to the Amended and Supplemental Complaint (R. 167), and it was stipulated at the hearing that they were correct and that no additional exhibits need be filed (R. 201).

The order of August 8, 1919, even if it purported to terminate the franchise contracts (which it does not), could not under the law effect such a termination. The said order was made without the service of notice, filing and service of a complaint, or the holding of a hearing, as required by statute, and therefore *the Commission had no jurisdiction to terminate such contracts*, and the said order, if construed as attempting to terminate the contracts, *would be illegal, null and void*. The jurisdiction of the Public Service Commission is special and limited, depending on statutory grant, and it must act strictly within the limits of its jurisdiction, otherwise its acts are void. In the case of *Hudson Valley Ry. Co. v. United Transportation Co.*, 217 N. Y. Sup. 614, it appeared that the Public Service Commission of New York made a certain order without notice to certain parties directly affected thereby. The court on page 619 of its decision in said case, states:

"It is true that, by statute, this commission is vested with exclusive original jurisdiction in all matters relating to common carriers. Notwithstanding that, it is a tribunal of special and limited jurisdiction. The nature, extent and exercise of this jurisdiction depend on the statutory grant. It cannot exercise any powers other than those which have been expressly conferred, and its power is not to be ex-

tended by construction or by unnecessary implication. It must act strictly within the limits of its jurisdiction, and any departure therefrom is usurpation of power that imparts no validity whatever to its decree. Lacking jurisdiction, its determination is void to every intent and for every purpose, and should be so declared by any court to which it is presented.

"The exercise of jurisdiction by that body does not raise a presumption of the existence of the requested jurisdictional facts, for nothing is presumed to be within the jurisdiction of such a body, and one who relies on its order or decree, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction. * * * The Commission could only acquire jurisdiction of the defendant's application upon compliance by it with the provisions of the statute. That statute requires that it give 'due hearing' upon such an application. To effectuate this provision of law, notice was required to all parties interested who might be affected by the result. * * * The objection to jurisdiction may be raised directly or collaterally whenever and wherever the power of the tribunal making the decree is brought in question. * * * This court should not hesitate to condemn and annul a determination of the commission whenever it has pronounced a judgment without power. Public policy neither requires nor justifies any other result."

See also:

Re Milwaukee, P. U. R. 1927B 229.

The previous orders affecting the Seattle franchise rates were *permissive* in form and did not affect *all* of the franchise rates. The order in Cause No. 31 of the Public Service Commission (R. 273), dated September 29, 1911, enumerated a few of the franchise rates which were expressly permitted to be raised and directed the maintenance of the *status quo*

as to the balance. The order in Public Service Commission Case No. 1825 (R. 249), dated August 5, 1916, permitted the cancellation of certain obsolete rates only and directed the maintenance of the *status quo* as to the balance. The so-called obsolete rates relate to a type of service no longer furnished and need not concern us further.

We have, therefore, this situation, to-wit: That prior to August 8, 1919, the Company had been *permitted* to raise, not in excess of the amount specified, a portion only of the franchise rates in both Seattle and Tacoma, the balance still remaining in full force and effect.

In the order under attack in this case, made by the Department of Public Works on March 31, 1923, the Department refused to change the rates continued in effect by said order of August 8, 1919. The legal effect of the order of August 8, 1919, was to *permit* the *modification* of the franchise rates in the same manner as if specific words to that effect had been inserted in the order.

> *State ex rel. Spokane v. Kaykendall*, 119 Wash. 107, 112; 205 Pac. 3.

The Supreme Court of Washington has had many occasions to consider the power of a Public Service Commission with respect to franchise contracts, and there have been numerous decisions with reference thereto, beginning with *State ex rel. Webster v. Superior Court*, 67 Wash. 37; 120 Pac. 861, and ending with *Monroe Water Co. v. Monroe*,

135 Wash. 355; 237 Pac. 996. An examination of these decisions will show that the Department of Public Works has no power to abrogate or even modify franchise provisions dealing with *general franchise matters*, but that it does have power to abrogate franchise provisions dealing with *rates or service* designed in behalf of the general public.

Since the Department cannot abrogate *all* franchise provisions, it is evidence that its authority is limited to *amending* the franchise contract, and that one set of rates is substituted for another and the contract as modified continues as a binding agreement, and this court does not have authority to further modify such contract.

The Supreme Court of Washington, in construing the Department's jurisdiction over franchise contracts, has considered it as a power to amend or modify the contract.

In *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 42, 57; 120 Pac. 861, it is said that the question there presented is whether the franchise rates "may be *altered* or annulled by the state under its reserve powers."

In *State ex rel. Tacoma Ry. & Power Co. v. Public Service Comm.*, 101 Wash. 601, 604; 172 Pac. 890, the court states that the question is,

> " • • • whether the public service commission is authorized by the statute to *relieve* from the franchise provisions complained of when the income of the company is not sufficient to pay a reasonable rate upon the value of the property devoted to the

public service and provide an adequate and sufficient service."

In *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 202; 172 Pac. 899, the Court says:

"The appellant and the City of Spokane having agreed upon the terms under which the appellant was allowed to operate, thereby entered into a contract which each of them have authority to make, and good faith and fair dealing will not permit the appellant to occupy the streets of Spokane by virtue of its franchise, and, at the same time, refuse to comply with the conditions thereof. It received from the city what it, at the time, deemed adequate consideration for its contract, and as long as it retains that consideration it must, in receipt therefor, perform the service at the price agreed upon, *except as it may be relieved* of those terms and conditions by the operation of the public service commission law."

See also:

Monroe Water Co. v. Monroe, 135 Wash. 355; 237 Pac. 996.

It is respectfully submitted, therefore, that it being a matter of discretion on the part of the Department of Public Works, or its predecessor, the Public Service Commission, to relieve the plaintiff from burdensome franchise provisions, and that discretion having been *in part* exercised and the plaintiff authorized to charge *some rates* in excess of those specified in the franchise, the franchise contract as amended by this discretionary act continues as a binding obligation, subject to further change only by a further exercise of discretion by the state regulatory body. Even though the rate authorized by

such exercise of discretion may have become confiscatory, that fact would not confer jurisdiction on this court, but the franchise contract is still in full force as between the parties and cannot be altered or abrogated by the Federal Court.

The abrogation of a contract is a valid exercise of the police power or it is a nullity. It is not for the Company or the court to say how far the *police power should have been exercised* in the matter of terminating the Pacific Company's franchise rates. It is for the state, through its legislative or other public authorities by the legislature thereunto authorized, to determine *when and to what extent* the public welfare requires the assertion of the police power.

Freeport v. Nassau & Suffolk Ltg. Co., 181 N. Y. Sup. 830, 832;

Warsaw v. Pavillion Natural Gas Co., 182 N. Y. Sup. 73, 75;

Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372; 63 L. Ed. 309;

State ex rel. Bissinger & Co. v. Hines, 186 Pac. (Ore.) 420;

Ohio & Colorado Smelting & R. Co. v. Public Utility Com., 187 Pac. (Col.) 1082, 1085;

Ohio & M. Ry. Co. v. Todd, 15 S. W. (Ky.) 56;

State v. Crawford, 2 A. L. R. (Kan.) 880.

The abrogation of a contract under the police power is justifiable only when done, not for the convenience or benefit of an individual or corporation, but for the promotion of a public welfare.

City of Superior v. Douglas County Tel. Co., 122 N. W. (Wis.) 1023, 1026;

Walla Walla v. Walla Walla Water Co., 172 U. S. 1; 43 L. Ed. 341, 346;

Columbus Ry. P. & L. Co. v. Columbus, 249 U. S. 399; 63 L. Ed. 669, 676, 677;

Warsaw v. Pavillion Natural Gas Co., 182 N. Y. Sup. 73, 75;

Freeport v. Nassau & Suffolk Ltg. Co., 181 N. Y. Sup. 830, 832;

Reed v. Anoka, 88 N. W. (Minn.) 981, 982;

Omaha Water Co. v. Omaha, 147 Fed. 1; 8 Ann. Cas. 614;

Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368; 46 L. Ed. 592, 602;

Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372; 63 L. Ed. 309;

Winfield v. Public Serv. Co., 118 N. E. (Ind.) 531, 533.

In the case last above cited it is said, at page 533:

"Such contracts are binding and mutually enforceable, and unless the public welfare requires, the legislature cannot impair the obligation thereof."

There is no contention in this case, nor was there any contention in any of the public service commission cases above referred to, that the public welfare required the termination of any or all of the franchise rates or the partial modification of any of them. Of course, the findings and order of the Public Service Commission, in so far as they purport to be exercises of the police power, must be founded upon a hearing at which evidence is taken, since the direct exercise of the police power without a hearing is a

purely legislative function which cannot be delegated to an administrative body.

It is clear, therefore, that all of said orders of the Public Service Commission must be regarded not as exercises of the police power, but as *permissive* raises in rates consented to by the state as principal in respect to a contract made by its agent, the City. Unless considered in this light, said orders are repugnant, not only to the Fourteenth Amendment, but to the "impairment" clause of the Federal Constitution. In other words, a contract may be terminated or modified in whole or in part by consent of the parties or by the exercise of the police power. To be sustainable as an exercise of the police power the *public* peace, health and welfare must be involved, but *consent* by the state is another matter. This is a mere permissive modification of the contract. There is much confusion in the decisions of the courts by reason of the failure to recognize the distinction between *modification by consent* and *termination under the police power*. This confusion is very obvious in the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861.

As was said in the case of *City of Sapulpa v. Oklahoma Natural Gas Co.*, 192 Pac. 224, 225:

"The great weight of authority is to the effect that, while a municipality may, in the absence of any direct action by the state, enter into a contract with a public utility, whereby the rates to be charged by the latter are fixed, and such contract, as between the parties themselves, is binding, nevertheless the state

has power, which it may delegate to an administrative body, such as a public service commission, to increase such rates, when because of increased costs, or any other reason, such rates are no longer reasonable. In other words, franchise rate contracts are not such contracts as may not be increased by the state, without infringing the constitutional guaranty.

"This rule apparently has not been expressly repudiated in any jurisdiction except Ohio and Virginia, where, as is shown above, the cities have been given express and definite power to make inviolable contracts as to rates.

"In general terms it may be said that these decisions rest on two general grounds: First, franchise contracts must be deemed to have been entered into with knowledge of the inherent and reserved power of the state to alter such contracts, when necessary so to do for the public welfare; second, municipalities being merely agents of the state, the state may, at any time, waive the rights of the municipality in the contract.

"*Not every case which passes upon the question makes the distinction* between these two grounds, and frequently both reasons are given for the decision. The attempt has been made, however, to separate the decisions, according as they lay the greater emphasis upon the one or the other of the two doctrines."

Consent of the state, as principal, over the protest of the agent city, is not a unique proposition. In the case of *Winfield v. Court of Industrial Relations*, P. U. R. 1922E 791, 794, 207 Pac. 813, in commenting upon this question, the court said:

"It has also been declared many times that when the state authorizes one of its municipal corporations to make a contract with private parties or public service corporations for a reasonable term of years, the state cannot by subsequent legislation impair that contract to the prejudice of the party with whom the

contract was made nor without the assent of such party thereto. The many cases declaring this principle are the ones here pressed upon our attention by counsel for the city. But these cases do not reach the matter here concerned. Here the state authorized its own subordinate governmental agency, the city of Winfield, to make a contract with Pattison and his assignees. Now the state by further legislation says in effect:

"'I resume this power and confer it upon another governmental agent, a Public Utilities Commission or an industrial Court, and I authorize it to act for me instead of my municipal corporation at Winfield.'

"When the city of Winfield made that contract with Pattison it was acting as the agent of the state for the benefit of the people of that municipality. Until the Public Utilities Law was enacted, the city and Pattison might have amicably changed that contract. In the act of 1911 (Laws 1911, ch. 238), the state put forward another agent clothed with power to deal with Pattison; and that agent of the state, with the express or implied consent of Pattison's present assignee has abrogated and changed certain features of that contract; and neither the Federal inhibition concerning the sanctity of contracts nor any other constitutional principle is violated thereby."

In the case of *Central Union Telephone Co. v. Indianapolis Telephone Co.*, 126 N. E. 628, 633, the court said:

"When a state, either directly or through the action of a municipality having express delegated authority so to do, has agreed to relinquish its right to exercise its regulatory power as to rates, or as to other matters prescribed by the contract, such agreement is reciprocal and binding only as between the parties to the agreement. Neither party to the contract can change it without the consent of the other;

but the parties to such a contract may agree by mutual consent to change the contract or to release each other entirely from the obligations of the contract. *Winfield v. Public Service Commission*, 118 N. E. 531. In making the contract the state, or the city, as the case may be, represents the public as against the person or corporation with which the contract is made; and, in agreeing to a change of the contract or to its complete rescission, the city, or the state, as the case may be, acts for the public and binds it as effectively in the one case as in the other."

In the case of *Borough of North Wildwood et al. v. Board of Public Utility Commissioners et al.*, 95 Atl. 749, P. U. R. 1916B 77, 78, appears the following statement:

"This, however, does not help the prosecutors; for, while the municipality itself has not assented to a change in rate, the state, its creator and parent, has done so through a specially constituted agency. If the water company were here complaining that its contract rights were being impaired, a different question would be presented; but the contract right of one of the state's creatures may be waived by the creator."

In the case of *Board of Survey v. Bay State St. Ry. Co.*, 113 N. E. 273, 274, the court said:

"In granting locations for street railways, boards of selectmen and boards of aldermen are public officers and not agents of their respective towns and cities. The state exerts its sovereign power through them as its instruments. *Flood v. Leahy*, 183 Mass. 232, 66 N. E. 787. The Legislature has the power, so far as concerns these public officers and the municipalities by whom they were elected, to change or abrogate the terms of such locations."

Also, in the case of *Portland v. Public Service Commission*, 173 Pac. 1178, P. U. R. 1919A 127, 134,

the Supreme Court of Oregon laid down the following rule:

"On the basis of contract the situation then presented is this: The state, acting by and in the name of its agents, the city, made an agreement with the company. It later created the Public Service Commission, giving it general authority over all such and kindred matters everywhere in Oregon, except as stated. By this legislation there came into existence a new representative of the state, endowed by it with plenary power, and to which the other party to the so-called agreement applied for a modification thereof. After investigation and deliberation, which may be likened to negotiations between contracting parties, the state, by its agent, the Commission, has consented to a change in the contract, allowing the company to charge an increased rate of fare. Whatever might be said if one of the parties to the contract, without the consent of the other, should attempt to change it, whether by legislation impairing the obligation of the contract or otherwise, it does not apply to the present situation; for, as stated, the contracting parties have themselves agreed to the change."

Again, in the case of *Robertson v. Wilmington & P. T. Co.*, 104 Atl. 839, P. U. R. 1919B 129, 137, the court said, at page 137:

"It clearly appears from the authorities that the fixing of rates to be charged by public service corporations is a governmental function, and that it can be conferred by the legislature on a state agency, such as a municipality or public utility commission; that when the rate has been fixed by statute it cannot be changed by one party without the consent of the other, if the grant of the right clearly and unmistakably constitutes a contract between the parties; if it was not a contract, but a mere regulation, prohibition, or condition of franchise, the state may,

under its police power, which is an attribute of sovereignty, regulate or alter the rate that had been fixed by statute, municipal ordinance, or commission's order.

"Applying to the present case the text contained in the opinion of Justice Day above quoted, was the fixing by statute of a maximum rate of 5 cents a renunciation of the sovereign right to fix rates evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction? Was it clearly a contract between the state and the companies, or merely the condition of a power or franchise granted? When the legislature said the companies should not charge a rate exceeding 5 cents, there was, of course, an implied agreement that they should have a right to charge that much; but was it in fact anything more than a prohibition against charging a higher fare? It is true that, when the companies accepted the provisions of the statute that fixed the maximum rate, they impliedly agreed not to charge more than such rate; but was the language employed such as to evidence unequivocally an agreement that the state had renounced the right to fix a different rate?"

And again, on page 138, the court said:

"But this is not a case where the state, through the agency of the Utility Board, is endeavoring to reduce the fare below the sum which it had agreed might be charged, or to limit the right or power that had been given to the company, as in the Bowers case. Neither is it a case where the company, upon its own motion, had charged more than 5 cents, which it had agreed not to exceed. It is a case where the state, which had fixed a maximum rate of 5 cents, agrees, through an agency it had created, that the companies may charge a higher rate, the other party to the contract consenting thereto. So that even though there was a contract binding on the parties that made it, it was possible for them to change it if it was right and proper to do so."

In the case of *State ex rel. Indianapolis Traction & Terminal Co. v. Lewis et al.*, 120 N. E. (Ind.) 129; P. U. R. 1918F 111, at pages 115, 116, the court makes the following comment:

"The doctrine is elementary, that legislative action, if possible, should be so construed as to give effect and meaning to all its provisions. The 1913 Public Utility Law introduced a new departure in the handling of public utilities, and was effective to withdraw from the municipalities certain powers theretofore exercised by them. The purpose of this law was, in part, to correct through an unprejudiced tribunal certain unfair action against the people by the utility, or by the people against the utility, and, in so far as possible, fix a uniform procedure throughout the state for all concerned. At the time this law was passed the legislature knew that all public utilities of the state were using the streets and public thoroughfares of cities and incorporated towns, as well as other public highways, by consent of the state directly given, or through its regular constituted representatives. It also knew that as to all these utilities operating under an unexpired franchise or contract, it was inhibited by the Federal Constitution, Article 1, Sec. 10, from passing any law impairing these obligations."

The company at one time, as assignee, owned two *blanket* franchises in Seattle, the Sunset and Independent Franchises. Each of these blanket franchises authorized service *throughout the city* and the placing of quipment in *all of the city streets*. Being co-existing written contracts, they would have to be read together during such time as both were valid and subsisting agreements, and effect given to the provisions of each in so far as the earlier Sunset

Franchise was not in conflict with and superseded by the later Independent Franchise. *Cleveland C. Ry. v. Cleveland,* 94 Fed. 385. Two co-existing franchises must be so construed together.

Borough of North Wildwood v. Board of Pub. Utl. Comm., 95 Atl. 749;

Cleveland C. Ry. Co. v. Cleveland, 94 Fed. 385;

City of Philadelphia v. R. A. P. Ry. Co., 22 Atl. (Pa.) 695;

City of Shreveport v. S. W. G. & E. Co., 258 Fed. 59;

Borough of Easton v. Lehigh Water Co., 97 Pa. St. 554;

State ex rel. Bridgeton v. B. & N. T. Co., 45 L. R. A. 837;

Mahan v. Michigan Tel. Co., 93 N. W. (Mich.) 629;

The foregoing principle is but a statement of the general rule of contract laid down by all of the authorities, and aptly stated by Page in his work, "Page on the Law of Contracts" (2nd ed.), Sections 2490 to 2494, inclusive.

The Company seems to be committed to the peculiar theory that in Seattle it could be the owner of, and operate under, two separate blanket franchises of city-wide application, and be bound only by one or the other franchise as it saw fit; and that it could exclude itself from the operation of one of the franchises by purporting to take out permits under the other, even though some of the property placed in the street under such permits might be joined to and commingled with property confessedly placed in the

street under the other franchise. We submit that while the two franchises were in existence *both* must be looked to in order to measure the company's responsibilities. We further submit that commingled property, regardless of the character of the permit authorizing installation, is referable to the basic franchises (or the remaining franchise after one has expired) as the authority for its location in the streets. *Illinois Trust & S. Bk. v. Arkansas City W. Co.*, 67 Fed. 196.

It is the contention of the Pacific Company that it is now operating in the city of Seattle and using the streets of said city without being burdened with or subject to any franchise obligation. It admits that it was operating at one time under two franchises, the "Sunset Franchise" and the "Independent Franchise." It is further admitted that the "Sunset Franchise" has expired. It claims that by reason of a purported assignment of the Independent Franchise to one F. H. Crosby, of San Francisco, that it, the Pacific Company, is relieved of any of the conditions or obligations therein imposed.

The appellants contend that the company, in order to use the streets legally, must now operate under the unexpired "Independent Franchise," and that the purported assignment to F. H. Crosby of the Independent Franchise does not relieve the company from the obligations and conditions imposed therein, particularly as to the maximum rates speci-

fied therein as modified by the Public Service Commission of the State of Washington.

The Pacific Company in making this purported assignment to F. H. Crosby, has done so for the purpose of relieving itself, as grantor, from the liabilities contracted or incurred in the operation, use or enjoyment of such franchise and of its privileges. The property of the "Independent Company" and the "Sunset Company" were commingled. Each of said companies had a common grant to use each and all of the streets of the City of Seattle for telephone and telegraph purposes. In the inventory of the property of the Pacific Company made in 1913, which was introduced in evidence in this case, the property of the Independent Company was included, and the Pacific Company has received a return on the valuation of the combined properties of both companies. No attempt has been made by F. H. Crosby, the assignee of said franchise, to conduct, maintain or operate within the limits of the City of Seattle, a telephone or telegraph system. The company retains the benefits but attempts to repudiate its obligations thereunder.

Section 8 of Article XII of the Washington State Constitution, provides that:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges."

The Supreme Court of the State of Washington has construed this provision of the State Constitution in the case of *State ex rel. Tacoma v. Sunset Tel. & Tel. Co.*, 86 Wash. 309, 322, 150 Pac. 427, as follows:

"It must, therefore, be considered that all parties dealt with the subject-matter with full consideration of the existing law, and that such duties and privileges as the law expressed were portions of the contracts and transactions. The law authorizing the judicial sale of property and franchise was part of the contract. The constitutional provision making the franchise and property subject to all liabilities under the franchise also entered into the entire series of transactions and follows and binds even the purchaser at judicial sale, for it must be held to purchase with full knowledge and understanding of all legal conditions attaching under the paramount law to the franchise. The purchaser even at judicial sale of a public franchise cannot enjoy the easements and other privileges without assuming the burdens attached."

Again, in the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, at page 64, the court in commenting upon the obligation of a corporation in reference to its franchise, said as follows:

"A corporation cannot, without the assent of the Legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special

charter from the Legislature, and to those formed by articles of association under general laws."

It was said, in the case of *Thomas v. West Jersey Railroad Company*, 101 U. S. 38; 25 L. Ed. 950, at page 952, as follows:

"That principle is, that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *R. R. Co. v. Williams*, 17 How. 30, 15 L. ed. 27."

In the case of *The York and Maryland Line Ry. Co. v. Winans*, 17 How. 31; 15 L. Ed. 27, at pages 29 and 30, the court said as follows:

"The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the Company; that they were the exclusive property of the Maryland Corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision it may avoid further responsibility. But those acts involve an overturn of the relations which the Charter has arranged between the Corporation and the community. Import-

ant franchises were conferred upon the Corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and incorporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The Corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon, N. S. 550; *Winch v. B. & L. Railway Co.*, 13 L. & E. 506."

In the case of *Georgia Railroad & Banking Co. v. Haas*, 56 S. E. 313, it was held that if a railroad company makes a lease to, or licenses another to exercise its franchises, in whole or in part, without express legislative authority, it remains liable for the acts of the lessee or licensee in such operation.

In construing a constitutional provision of Utah, which is as follows:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges,"

the court said, in the case of *Cooper v. Utah etc. Ry. Co.*, 102 Pac. 202; 136 Am. St. Rep. 1075, at pp. 1086 and 1087, as follows:

"So construing the constitution, we are of the opinion that its provisions restricted the alienation of the franchise held by the Utah Light and Power Company, and which were granted by the municipality, to occupy and use the streets and public places so as to relieve such franchises, or any property held thereunder—property which was necessarily held and used in the operation, use, or enjoyment of the

rights and privileges conferred by such franchises, and which property was necessary to successfully operate, use, or enjoy such rights or privileges—from the liabilities of such company contracted or incurred in operation, etc. Such holding not only includes such franchises, but also the poles and wires erected and maintained in the streets and public places of the city, for such property was necessary to the use and enjoyment of the rights and privileges granted by the municipality, and without which such rights and privileges could not successfully have been exercised and enjoyed."

The inconsistent attitude of the Company in continuing to occupy the streets while pretending to have assigned its franchise brings it squarely within the condemnation of our own Supreme Court.

In the case of *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 102 Wash. 196, 202, 172 Pac. 899, the court said:

"The appellant and the City of Spokane having agreed upon the terms under which the appellant was allowed to operate, thereby entered into a contract which each of them had authority to make, and *good faith and fair dealing will not permit the appellant to occupy the streets* of Spokane by virtue of its franchise, *and, at the same time, refuse to comply with the conditions thereof.* It received from the city what it, at the time, deemed adequate consideration for its contract, and *as long as it retains that consideration it must, in receipt therefor, perform the service*, at the price agreed upon, except as it may be relieved of those terms and conditions by the operation of the public commission law."

An illuminating discussion, by the Supreme Court of Appeals of Virginia, of the power of a pub-

lic service commission with respect to changing franchise rates, will be found in,

Town of Victoria v. Victoria Ice, Light & Power Co., 114 S. E. 92;

City of Portsmouth v. Virginia Ry. & Power Co., 126 S. E. 362.

CONCLUSION.

In conclusion, we submit that by virtue of the existence of valid franchise contracts between the Pacific Company and the Cities of Seattle and Tacoma at the commencement of this litigation, and at the time of trial, which contracts, as amended by the Department of Public Works or its predecessor, were binding upon the Company, no question of confiscation is presented by this record, no Federal question arises and the Federal Court is without jurisdiction.

We, therefore, respectfully submit that the decree of the United States District Court, for the Western District of Washington, Southern Division, entered May 19, 1926, was erroneous; that said decree should be reversed and the case dismissed.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

Solicitors for Appellants.

THOMAS J. L. KENNEDY,
Of Counsel.

APPENDIX

SECTION 10379 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

EXISTING CONTRACTS—EFFECT.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however,* That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

SECTION 10391 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

COMMISSION TO FIX CHARGES AND SERVICE OF TELEPHONE AND TELEGRAPH COMPANIES.

Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the rental

or use of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telephone extension or extension system, or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided.

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telegraph company or telephone company are unjust or unreasonable, or that the equipment, facilities or service of any telegraph company or telephone company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as hereinafter provided.

SECTION 10422 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

COMPLAINTS.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: *Provided,* That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: *Provided, further,* That when two or more public service corporations (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative,

discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression, or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: *Provided*, All grievances to be inquired into shall be plainly set forth in the com-

plaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission.

SECTION 10423 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

Hearings, Orders and Record.

At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service

thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission.

SECTION 10424 OF REMINGTON'S COMPILED STATUTES (1922) OF WASHINGTON.

INCREASE IN RATES—SUSPENSION—BURDEN OF PROOF.

Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge,

rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: *Provided*, That if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 150.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants,*

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Respondent.*

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANTS' REPLY BRIEF

JOHN H. DUNBAR,
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IN THE

SUPREME COURT

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OCTOBER TERM, 1927

No. 150.

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vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Respondent.*

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANTS' REPLY BRIEF

The appellants raise but one question in this court, namely, the franchise relations between the respondent, The Pacific Telephone and Telegraph Company, and the cities of Seattle and Tacoma.

Throughout this brief respondent, The Pacific Telephone and Telegraph Company will be referred to as the "Pacific Company," the City of Seattle will be referred to as "Seattle," and the City of Tacoma, as "Tacoma."

Respondent has not disputed appellants' contention that the state may authorize a municipal corporation to establish by an inviolable contract, the rates to be charged by public service corporations, nor the contention that the validity of such an agreement is not affected by the fact that the contract rates have become confiscatory. Neither does it dispute appellants' contention that respondent, at the time of the commencement of this suit, was operating in Seattle under the franchise granted by Ordinance No. 6498, commonly known as the "Independent Franchise."

The District Court held that the *purported* order of the Public Service Commission entered August 8, 1919, following the termination of Federal wire control, pretending to continue in effect the rates established by the Postmaster General, and the Commission's order of March 31, 1923, suspending the schedule of rates filed by the Pacific Company, had the effect of terminating and abrogating the franchise rates, and making the Postmaster General's rates "statutory" rates, as distinguished from "franchise" or "contract" rates.

In this we think the District Court was in error. The order of August 8, 1919, was based upon the Pacific Company's informal request that the Postmaster

General's rates be continued in effect and asking a waiver of the thirty days' statutory notice. Said request was filed on the 8th day of August, 1919, and on the same day the Public Service Commission, without the statutory prerequisites of the filing of a tariff, service of notice or conducting a hearing, entered the following *ex parte* pretended order:

"The Commission having considered the foregoing application,

"It is Ordered, that leave be granted petitioner to continue in effect the rates, rules and regulations above named, effective August 1, 1919, until further ordered by the Commission." (R. p. 168.)

The order of March 31, 1923, in so far as it relates to rates, reads as follows:

"Wherefore it is Ordered:

"1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and *existing rates* shall remain in effect until the further order of the department." (R. p. 69.)

The District Court assumed that the reference to *"existing rates,"* continued in effect by said order, had to do with the rates established by the Postmaster General during the period of Federal control, when the State Public Service Commission had no jurisdiction over the subject matter. *State ex rel. Seattle v. Public Service Commission*, 110 Wash. 30, 188 Pac. 7. But the expression "existing rates" must refer to the *legally effective rates* at that time, not illegal exactions. Clearly the promulgation of the

Postmaster General's rates did not have the effect of terminating the franchise. These rates were terminated by the Congressional act repealing wire control, effective December 1, 1919 (41 Stat. L. 157). The subsequent Commission order of August 8, 1919, authorizing the Postmaster General's rates to be continued in effect having been entered without jurisdiction was ineffective as an exercise of the police power and therefore permissive only if effective for any purpose whatever. Neither the order of August 8, 1919, nor that of March 31, 1923, directly or indirectly purported to terminate the franchise rate provisions.

Respondent contends that the Supreme Court of the State of Washington in *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, held that when the department by order prescribes telephone rates, the rate provisions of numerous franchises are *ipso facto* terminated, and the rates so fixed by order of the department become department or statutory rates, as distinguished from franchise or contract rates; that their character as being confiscatory or not must be tested by the general and familiar principles of law applicable to rate regulation, and if such rates are confiscatory in their effect, they are void.

That is not the holding of the *Kuykendall* case. There is no language in that decision which supports respondent's contention. The Supreme Court of Washington did not hold that the rates fixed by the department were distinguishable in character from

franchise rates, nor that the Department having once granted an increase in rates, the franchise contract was itself terminated. All that it holds is that when the Department *after hearing* has fixed rates higher than the franchise rates, the latter are terminated, and the franchise contract is, to that extent, modified.

It is apparent from other decisions of the Supreme Court of the State of Washington that the Department of Public Works has no power to *terminate* franchise contracts or franchise provisions, but that its power is limited to modifying franchise provisions with reference to rates and service.

In *State ex rel. Tacoma R. & P. Co. v. Public Service Comm.*, 101 Wash. 601, 172 Pac. 890, the court said (page 607):

"The right to deal with the question of rates and service is an entirely different matter from the right to grant franchises or abrogate the provisions thereof. The franchises in question having been granted under the clear and express authority of the statute enacted long prior to the public service commission law, it seems plain that it was not the intent of the latter law to grant power to the commission to abrogate franchise provisions. Had the legislature desired to confer this power upon the commission it would have been easy to have said so in such language as would have made the intent plain."

Again, in *Seattle v. Puget Sound T. L. & P. Co.*, 103 Wash. 41, 174 Pac. 464, the court said (page 46):

"If the law confers power upon the public service commission to modify or abrogate franchise provisions, it must be found in Laws 1911, p. 571, Section 53 (Rem. Code, Sec. 8626-53), which confers upon the commission the power to deal with the ques-

tions of safety, efficiency, rates and quality of service. There is nothing in this section which, either expressly or by necessary implication, confers power upon the public service commission to deal with the question of franchise or to modify or abrogate any of the terms or conditions that may have previously been imposed therein. The law will be searched in vain for any provision which confers such power upon the public service commission with reference to such a public utility as that before us."

In *Monroe Water Company v. Monroe*, 135 Wash. 355, 237 Pac. 996, the court said (page 358):

"* * * there was power conferred upon the commission to deal with questions of safety, efficiency, rates and quality of service, but none, either expressly or by necessary implication, to deal with the questions of franchises, or to modify any of the terms or conditions that may have been previously imposed."

Franchise rates may be modified by the state, either through the exercise of its police power, or by consent, the latter method being based on the theory that the city is an agent of the state, and the state can consent to a modification of its agent's contract. In either event, action by the state is necessary. In this case, not only is consent or action by the state lacking, but the state, through its Department of Public Works, has refused to increase the rates either by the exercise of its police power or by consent to a modification of the contract.

Respondent concedes that if the original franchise rates were now in force, the refusal of the department to increase them would be final, and it

would have no recourse to the courts, either state or Federal. Its contention here, however, is that while the original franchise rates could not, in law, be confiscatory, because agreed to by the company, higher rates *permitted* by the commission or department could be confiscatory and subject to compulsory increase at the hands of the courts. In other words, respondent's contention is that if the state has never exercised its police power to modify rates, it cannot be compelled to do so, but once it has exercised that power, it can thereafter be compelled to further exercise it. Carried to its logical conclusion, respondent's theory is that once the police power is exercised by the legislative branch of the state, (the only branch of the state government in which that power is vested), the legislature is immediately divested of that power, and its exercise is transferred to the judicial department. Such a position is untenable and we have not been cited to a case so holding.

In the cases relied upon by respondent the state had modified rates by the exercise of its police power and there was no attempt to compel the state to exercise its discretion in a particular manner. The decisions merely uphold the right of the state, by the exercise of its police power, to modify franchise rates. In the case at bar, the state has exercised its discretion by refusing to modify the rates, and respondent seeks to compel it, not to exercise its discretion, but to exercise its police power in a particular manner, and this it cannot do.

Respondent contends that the construction of a state statute by the court of last resort of the state is binding upon this court. With this contention we disagree. Where questions of contract rights and Federal questions are involved, Federal courts must decide such questions for themselves.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67;

Louisville Trust Co. v. Cincinnati, 76 Fed. 296.

In any event, where the state Supreme Court has not passed squarely upon the question involved, this court is not bound by any purported construction placed upon such statute. It is clear from a reading of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, that the state Supreme Court has never held that franchise rates, increased by order of the Department of Public Works, become department or statutory rates, as distinguished from franchise or contract rates, nor that if such rates are confiscatory in their effect, they are void.

In view of the fact that the state court has not passed upon this question, this court is at liberty to place its own interpretation upon the statutes set forth in the appendix to appellants' opening brief.

At the close of its brief, respondent makes a contention that the Department will not be heard to controvert the construction of a state statute and a rule of public policy announced by the court of last resort of the state. This is a question-begging argument, for, as we have pointed out in this brief, the

Kuykendall case does not support respondent's contention as to the construction of Rem. Comp. Stat. Sec. 10379. Certainly the department is not bound by the Pacific Company's statement of the Supreme Court's construction of that statute.

Respondent contends that the department cannot question the purported construction of said statute, for the reason that it is the very statute which gives existence to the department and from which all its power and authority is derived. Even though the Supreme Court had construed the statute as respondent contends, and the department were bound by the construction of the statute creating it, respondent's contention falls, by reason of the fact that the Attorney General of the state is one of the appellants in this case, and his office is not created by that or any other statute, but by the constitution of the state (Art. III, Sec. 1, Constitution of Washington). His right of appeal is not affected by any construction, purported or otherwise, of said statute by the state Supreme Court.

CONCLUSION.

In conclusion we submit that the franchise rate provisions between the Pacific Company and the cities of Seattle and Tacoma, were in full force and effect at the commencement of this litigation; that they have never been terminated by any valid order of the Department of Public Works or Public Service Commission of the state of Washington; that they are binding upon the company and the question of confiscation is immaterial; that no Federal question arises and the Federal courts are without jurisdiction.

We further submit that the Department of Public Works having exercised its discretion by refusing to increase such franchise rates, cannot be compelled by the courts, either state or Federal, to exercise that discretion in a different manner.

We therefore respectfully submit that the decree of the United States District Court, for the Western District of Washington, Southern Division, entered May 19, 1926, was erroneous; that said decree should be reversed and the case dismissed.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

Solicitors for Appellants.

THOMAS J. L. KENNEDY,
ARTHUR SCHRAMM,
Of Counsel.

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1937

No. 159

JOHN C. DEWEY, as Director of Public Works of Washington; O. O. CALLOMON, as Supervisor of Transportation of Washington; and C. RAY NOONE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Respondent.

APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES

JOHN H. DUNBAR,
Attorney General of the State of Washington.

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THOMAS J. L. KENNEDY,

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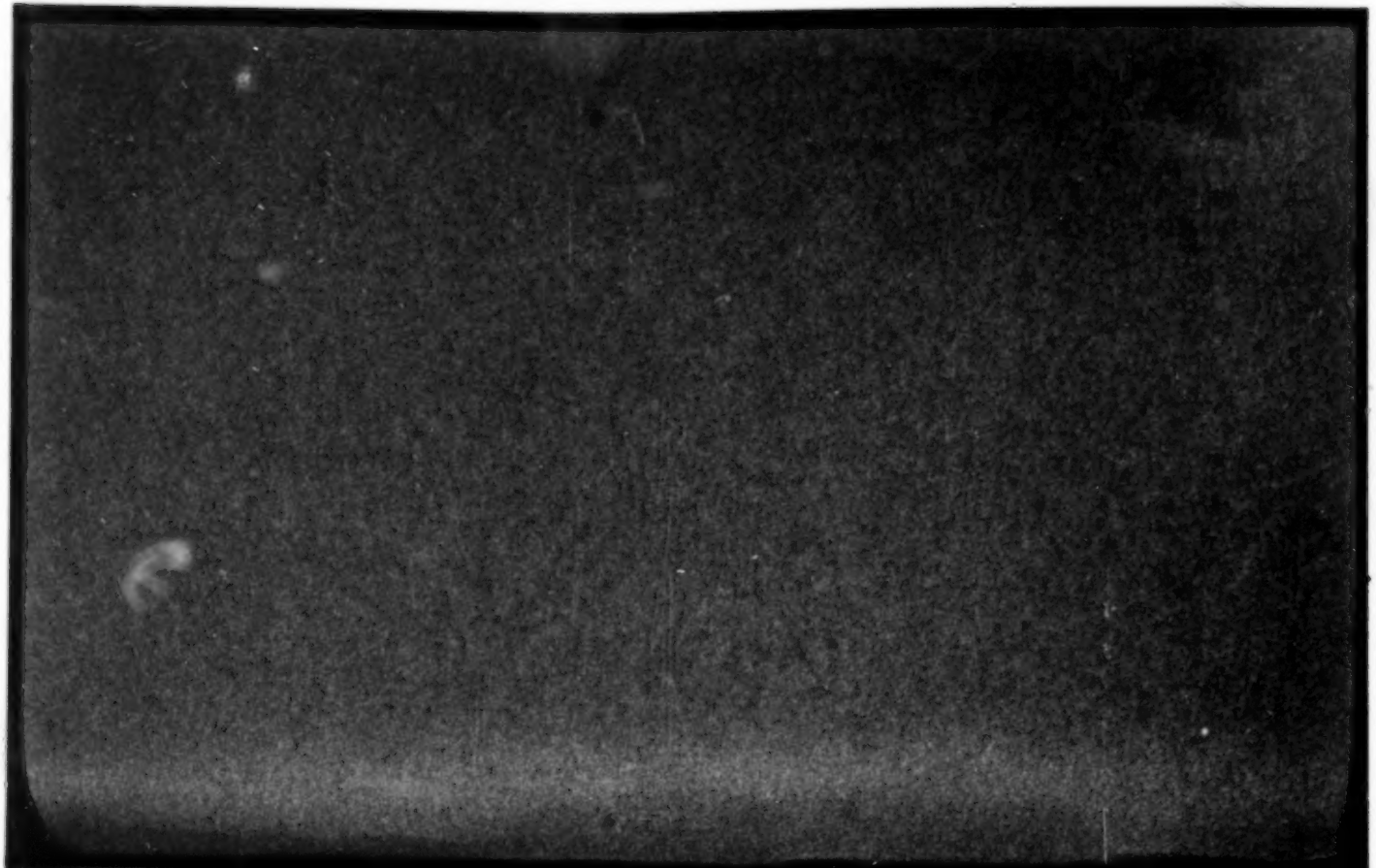

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 150

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants,*

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APPELLANTS' MEMORANDUM OF ADDITIONAL AUTHORITIES

Come now the appellants above named, and file herewith a list of additional authorities in the above entitled cause:

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48; 67 L. Ed. 125, holding that a statutory provision permitting a public service cor-

poration to change its rates by filing with the Public Service Commission a schedule showing the changes, does not authorize such corporation to abrogate contract rates in that manner, and further holding that under a statute authorizing the Public Service Commission to change contract rates of a public service corporation if after hearing they are found to be unjust, an order changing a contract rate without such a finding is void.

Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. 895, holding that a Public Utility Commission cannot fix a new rate without a determination of the propriety of the change and without a finding that existing rates are unjust, unreasonable, insufficient or unjustly discriminatory; that before a contract fixing rates can be interfered with, under the police power, it must appear that the contract in some manner adversely affects the welfare of the public; and that the mere filing of a new schedule by a power company is not in itself a valid method of changing contract rates, since a power company cannot itself exercise the police power of the state to relieve it in the public interest from a burdensome contract.

Northern Pacific Ry. Co. v. St. Paul & Tacoma Lumber Co., 4 Fed. (2nd) 359, holding that a lawful change by the Department of Public Works of a rate fixed by contract, does not destroy the contract, but modifies its terms.

Suburban Water Co. v. Burrough of Oakmont, 110 Atl., 778 (Pa.) where the court said:

"While we have held that the acts of public service companies, under the Public Service law, supersede the acts of these companies with their patrons when they are in conflict, it is not exactly correct to say the entire contract is annulled. It may still be a contract between the parties *modified* or *enlarged* by the acts of either the company or the commission, under the Public Service law, and, if the consumer sees fit to recognize a change, it is still a contract." (Page 781.)

"The contract is simply *modified* or *reformed* so as to include for the time being the new rate fixed by law." (Page 782.) (Italics ours.)

North Coast Power Co. v. Public Service Commission, 114 Wash. 102, holding that contracts existing at the date of the Public Service law, could not be abrogated or suspended by either the going into effect of the law or the subsequent filing of a schedule fixing a rate different from that named in such contracts; that they constitute a class of their own, to be terminated only by order within the discretion of the Commission; and recognizing a distinction between existing contracts and those made after the enactment of the Public Service law.

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In the

Supreme Court of the United States

OCTOBER TERM, 1927

No. 150

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Respondent.

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Respondent

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Brief of Respondent

STATEMENT OF THE CASE

The Department of Public Works of the State of Washington (the members of which and the Attorney General are the appellants and are hereinafter re-

ferred to as the "Department") after an exhaustive investigation in which all parties in interest were fully heard, entered the order in suit on March 31, 1923, prescribing the telephone rates, both toll and exchange, to be charged by The Pacific Telephone and Telegraph Company, appellee (hereinafter referred to as the "Company") in and generally throughout the State of Washington, including the cities of Seattle and Tacoma.

A few days later this suit was commenced by the Company in the District Court of the United States, for the Western District of Washington, to enjoin the enforcement of these rates as being confiscatory of the property of the Company in violation of the due process provision of the Fourteenth Amendment.

An interlocutory injunction was applied for and granted by the three-judge court constituted under Section 266 of the Judicial Code, and thereafter the cause was heard by a Special Master upon whose report the court of three judges (organized pursuant to Section 266 as amended February 13, 1925, requiring three judges on final hearing) entered its final decree adjudging the rates confiscatory and granting a permanent injunction. The case below is *Pacific Tel. & Tel. Co. v. Whitcomb, et al*, reported in 12 Fed. (2d) 279. The opinion is in the Record, pp. 175 to 193.

The defense below presented two principal contentions, namely: first, that the rates were not confiscatory in effect, and, second, with respect to the cities Seattle and Tacoma, that the rates to be charged in those cities were contractual franchise rates, and therefore were not confiscatory in the constitutional sense, although non-compensatory.

The first contention has now been abandoned, and it stands admitted that the rates were confiscatory in effect. Only the second question is, therefore, presented upon this appeal. In deciding this question in favor of the Company, the court below said:

"In behalf of the cities of Seattle, Tacoma, and Spokane,* it is contended that the plaintiff companies are entitled to no relief because in these cities the companies were operating under franchises which prescribed rates substantially lower than those allowed by the department, and that the franchise rates are controlling, particularly since the department did not expressly and in pointed terms abrogate and cancel them. It cannot be doubted that where a franchise contract is entered into between a municipality and a public utility corporation fixing rates to be charged by the latter for a not grossly unreasonable period of time, such rates are binding and enforcible, even those confiscatory of the property involved. *St. Cloud Pub-*

*The reference to Spokane is due to the fact that the case of The Home Telephone and Telegraph Company against the Department (which involved Spokane rates only), and this case, were considered as consolidated for certain purposes by the Special Master and the Statutory Court.

lic Service Co. v. City of St. Cloud, 44 S. Ct. 492, 265 U. S. 352, 68 L. Ed. 1050. Nor can it be doubted that under the statutes of the state of Washington the department has the power to abrogate and cancel such franchise rates if in a proper case it sees fit to do so. Section 10379 of Remington's Compiled Statutes of Washington provides:

" 'Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment, or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. L. 1911, p. 567, § 43.'

"Construing this statute in the case of *State ex rel. Spokane v. Kuykendall*, 205 P. 3, 4, 5, 119 Wash. 107, 111, 112, the Supreme Court of Washington said:

" 'By the act of 1911 (Laws of 1911, p. 551, § 34) the terms of a franchise contract like the one in question here are binding upon the parties until the Department of Public Works (heretofore the Public Service Commission) has made an order directing a departure therefrom; and, without question, the de-

partment has the right and power to order a departure. *State ex rel. Ellertsen v. Home Tel. & Tel. Co.*, 172 P. 899, 102 Wash. 196. In the case of *State ex rel. Webster v. Superior Court*, 120 P. 861, 67 Wash. 37, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, it was decided that the Public Service Commission law places the entire subject of rate regulation under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case.'

"In this same case the point was urged that the department, in fixing the new rates, did not in express terms cancel and terminate the franchise rates. Answering this contention, the court said:

" 'The present order of the Department of Public Works is just as effective as if, after fixing the rates, there had been added therein the words, "and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated," or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material.'

"This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court. The special master concluded that the order of the Public Service

Commission (now the Department of Public Works) entered on August 8, 1919, and after the termination of federal control of the properties, continuing in effect the rates established by the Postmaster General so far as the Pacific Company is concerned, and the orders of the department to the same effect entered on March 31, 1923, as to both the Pacific and the Home Companies, had the effect of terminating and abrogating the franchise rates, and that the rates established by the department in their stead became 'department' or 'statutory' rates, as distinguished from 'franchise' or 'contract' rates. In this we agree with him. *State ex rel. Spokane v. Kuykendall, supra.* It may be conceded that the department was not obliged to grant any relief against the rates stipulated in the franchises, and that it could not by judicial action be compelled to do so. Yet, if it undertakes to terminate such rates pursuant to its plain statutory powers, the rates substituted instead must be fair, just, and reasonable, if the plain mandate of the statute defining its duties is to be obeyed. And, when the substituted rates are challenged, they must be considered as statutory—not franchise—rates, and their character as being confiscatory or not must be measured by the principles of law applicable to such rates."

(12 Fed. (2d) 287, 288; R. pp. 189, 190, 191.)

We might well rest the company's case upon the foregoing opinion.

POINTS AND AUTHORITIES

When the Department by order prescribes telephone rates, the rate provisions of numerous franchises are *ipso facto* terminated and the rates so fixed by order of the Department, become department, or statutory, rates as distinguished from franchise or contract rates, and their character as being confiscatory or not must be tested by the general and familiar principles of law applicable to rate regulation. If such rates are confiscatory in their effect, they are void.

(a) The Supreme Court of the State of Washington has definitely so held.

State ex rel. Spokane v. Kuykendall, 119 Wash. 107.

See also—

State ex rel. Webster v. Superior Court, 67 Wash 37;

Puget Sound Traction Co. v. Reynolds, 244 U. S. 574-9.

(b) This construction of the state statute by the highest court of the State is binding upon the Federal courts.

Claiborne County v. Brooks, 111 U. S. 400;

Norton v. Shelby County, 118 U. S. 425;

Williams v. Eggleston, 170 U. S. 304;

Hunter v. Pittsburgh, 207 U. S. 161;

Old Colony Trust Co. v. Omaha, 230 U. S. 100;

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Douglas v. Noble, 261 U. S. 165;

Georgia Ry. & P. Co. v. Decatur, 262 U. S. 432;

Opelika v. Opelika Sewer Co., 265 U. S. 215;

Old Colony Trust Co. v. Tacoma, 230 Fed. 389.

The cases cited and relied upon by the Department in the companion case of *Home Tel. & Tel. Company v. Denney* are not in point.

Moreover, even in a case in which the Federal courts may exercise an independent judgment, the settled rule is that any reasonable doubt will be resolved in favor of that construction of a state statute

which has been adopted by the court of last resort in the state. In this case, the state rule is sound.

Yazoo & Mississippi Valley R. R. Co. v. Adams, 181 U. S. 580;

Burgess v. Seligman, 107 U. S. 20;

Barnum v. Okolona, 148 U. S. 393;

Kuhn v. Fairmont Coal Co., 215 U. S. 349;

Sim v. Edenborn, 242 U. S. 131.

(c) The Department will not be heard to controvert the construction of a state statute and a rule of public policy announced by the court of last resort of the state.

Southern Iowa Electric Co. v. Chariton, 255 U. S. 539;

Stewart v. Kansas City, 239 U. S. 14.

ARGUMENT

One of the Company's franchises to operate in the city of Tacoma was granted under Ordinance 2522, passed December 13, 1905, and duly assigned to the Pacific Company by an ordinance passed February 9, 1916. (R. pp. 165, 166). The ordinance named maximum telephone rates, and the rates prescribed by the Department, which are in controversy in this case, are in excess of the ordinance rates.

In Seattle, the Company formerly had two franchises: the Independent franchise, acquired by it in March, 1912, expiring January, 1926, and the Sunset franchise, acquired January 8, 1917, expiring in July, 1923. The Independent franchise contained provisions for maximum telephone rates for certain classes only of telephone service, which rates were lower than those prescribed by the Department's order of March 31, 1923, in controversy in this suit. For the purposes of this case no other facts concerning these ordinances are relevant.

On this appeal the appellee regards it as immaterial as to whether these franchises, or either of them, was in effect from time to time, the rate provisions of the Independent franchise having been terminated by the action of the Department as a matter of law.

The Railroad Commission of Washington, now the Department, in cause No. 31, made an order dated September 29, 1911, (prior to the purchase of said franchise by the Pacific Company) increasing telephone rates for all classes of service specified in the Independent franchise, in amounts greater than those fixed by the Independent franchise for such classes of service. The statement in appellants' brief, page 28, to the effect that all of the rates specified in the franchise were not increased by such order, is incorrect,

as an examination of the franchise provision (R. p. 144) and the rates fixed by the order of September 29, 1911 (R. p. 278), will demonstrate.

Thereafter, the Public Service Commission of Washington (formerly the Railroad Commission, now the Department) in cause No. 1825 made an order dated August 15, 1916, prescribing telephone rates for Seattle in excess of those specified in the Independent franchise or established by the order of September 29, 1911. (R., p. 223, 249.)

On August 1, 1918, the Postmaster General, under authority of Congress, took possession of the telephone lines of the Pacific Company and retained control until August 1, 1919. During the period of Federal control telephone rates were materially increased by the Postmaster General in the cities of Seattle and Tacoma. The Public Service Commission of Washington, on February 13, 1919, during the period of Federal control, made an order establishing the rates fixed by the Postmaster General as the rates of the Pacific Company. At the expiration of the period of Federal control, Congress provided that the rates theretofore fixed by the Postmaster General should continue in effect for a period of four months unless an application was made to the state commission, or other regulatory body, for other rates. On August 8, 1919, the Public Service Commission,

now the Department, made an order continuing the Postmaster General's rates in effect. (R. p. 286). The Department thereafter filed a formal complaint on January 21, 1922, challenging the rates of the Pacific Company, and entered upon an exhaustive investigation to which all interested persons were made parties, including the cities of Seattle and Tacoma. (R. p. 50.)

After a number of hearings in which witnesses were heard and full opportunity given for cross examination, the Department made the order in suit by which the Company's property was valued and existing rates continued in effect. In its investigation leading up to the order in suit, it is clear that the Department proceeded upon the theory that the franchise rates had no force and effect, and that it was in no way hampered thereby.

WHEN THE DEPARTMENT BY ORDER PRESCRIBES TELEPHONE RATES, THE RATE PROVISIONS OF MUNICIPAL FRANCHISES ARE IPSO FACTO TERMINATED AND THE RATES SO FIXED BY ORDER OF THE DEPARTMENT BECOME DEPARTMENT OR STATUTORY RATES AS DISTINGUISHED FROM FRANCHISE OR CONTRACT RATES AND THEIR CHARACTER AS BEING CONFISCATORY OR NOT MUST BE TESTED BY THE GENERAL AND FAMILIAR PRINCIPLES OF LAW APPLICABLE TO RATE REGULATION. IF SUCH RATES ARE CONFISCATORY IN THEIR EFFECT THEY ARE VOID.

THE SUPREME COURT OF THE STATE OF WASHINGTON HAS DEFINITELY SO HELD.

In the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, it was contended by the City of Seattle that the rate provision in the franchise granted to the Independent Telephone Company could not be abrogated or terminated by the regulatory body of the state. The Supreme Court, in answer to that contention, said:

"It having been heretofore held that the constitutional power can be exercised through a commission with power to fix rates, and that the public is not bound to pass a general law fixing maximum rates, it follows that the public utilities act is a 'general law,' and under many decisions of this court, supersedes any ordinance or charter provision of any city which may conflict therewith. The power to fix rates is a mere detail in the execution of the general law, and cannot be insisted upon as the essential letter of the law."

And again—

"Where the state is a party, and it appears tha there has been no express grant or waiver of its con stitutional right to fix rates so as to give an ordi nance the force of a contract binding upon the stat (granting that under our constitution this could b done), it cannot be held, as a matter of either law o policy, that a franchise such as the one now unde consideration is a contract binding upon the Stat of Washington."

These principles have been reaffirmed many time by the Supreme Court of the State of Washingto but we think we need not quote from the decision so holding because this court itself, in the case o *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 57 has clearly and succinctly stated the position of th Washington Supreme Court. In the case just men tioned it is said:

"Assuming (what is not clear) that the provisio in the franchise ordinances respecting the rates o fare and the transfer privilege are contractual i form, still it is well settled that a municipality ca not, by a contract of this nature, foreclose the exe cise of the police power of the State unless clearl authorized to do so by the supreme legislative powe The Constitution of Washington, Art. XII, § 18, r quires the Legislature to pass laws establishin reasonable maximum rates of charges for the tran portation of passengers and freight, and to corre abuses and prevent discrimination in rates by rai roads and other common carriers, and provides tha

'A railroad and transportation commission may be established, and its powers and duties fully defined by law.' By Art XI, § 10, any city containing a population of twenty thousand inhabitants or more is permitted to frame a charter for its own government 'consistent with and subject to the constitution and laws of this state.' This constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The Supreme Court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the State; that the Public Utilities Act superseded any conflicting ordinance or charter provisions of any city; and that contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the State."

A more precise and exact announcement will be found in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, where the court, after stating the statutory provision here involved, said:

"Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the

present order of the Department of Public Works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

THIS CONSTRUCTION OF THE STATE STATUTE BY THE COURT OF LAST RESORT OF THE STATE IS BINDING UPON THE FEDERAL COURTS

In *Norton v. Shelby County*, 118 U. S. 425, 439, this court said:

"Upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law. In these cases no principle of the Federal Constitution, or of any Federal law, is invaded, and no rule of general or commercial law is disregarded. The determination made relates to the existence of an inferior tribunal of the state, and that depending upon the constitutional power of the legislature of the state to create it and supersede a pre-existing institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the state court. As said by Mr. Justice Bradley, speaking for the court in Claiborne County v. Brooks, 111 U. S. 400, 410: 'It is undoubtedly a question of local policy with each state

what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state'."

In *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6, Mr. Justice Day, speaking for this court said:

"The Court of Appeals of Maryland stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company, not where no such rates had theretofore been established, but where a new system of commutation rates had been proposed by the railroad company and submitted to the commission. Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the commission under the statutes of Maryland to revise commutation rates where such rates had already been established by the action of the company. We must accept this definition of authority in the commission, so far as the state law is concerned, and direct our inquiry to the federal question presented."

In *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394, the court said:

"It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore

confided to it was taken away and lodged in another agency of the state—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final."

In *Douglas v. Noble*, 261 U. S. 165, there came before this court for consideration the dental law of the State of Washington. Mr. Justice Brandeis, speaking for this court, said that the construction of that statute

"* * * is a question of state law. Since the case is here on appeal from a Federal court, we must consider it, *Davis v. Wallace*, 257 U. S. 478. But in passing upon such questions we follow applicable decisions of the highest court of the state."

Again, in *Georgia Railway Co. v. Decatur*, 262 U. S. 432, 437, the court said:

"The principal question, and the one to which the briefs and arguments are mainly directed, is, whether the agreement between the plaintiff and the Electric Company was within the powers of the town and is now valid and subsisting. This contract has been before the Supreme Court of Georgia in the course of the litigation on three distinct occasions: 149 Ga. 1;

152 Ga. 143, and (the instant case) 153 Ga. 329. That court, in carefully considered and well reasoned opinions, sustained the authority of the municipality and upheld the contract as valid and subsisting. Defendants contend that the authority to fix rates devolved by the state constitution upon the General Assembly, and, therefore, that the Town of Decatur was without power to enter into a contract on that subject. When the contract was made the General Assembly had never exercised this authority and the State Supreme Court held that there was nothing in the constitution of the state which precluded the municipality from contracting as to fares; and that, while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the state had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. See *Milwaukee Electric Ry. Co. v. Wisconsin R. R. Comm.*, 238 U. S. 174, 183. This conclusion involving, as it does, a construction of the state constitution and laws and powers of state municipalities, is controlling upon this court, as it has decided many times."

Finally, in the case of *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, it appears that three different public utilities operating in three municipalities in the State of Iowa brought suits to enjoin the enforcement of maximum rates concededly confiscatory, but specified in the franchises granted by the

municipalities to the companies. The municipalities contended that they had the power to make a binding contract as to rates. The Supreme Court of Iowa had held that in that state there could not be a valid contract fixing permanent rates. Nevertheless, the trial judge dismissed the bills of complaint filed on behalf of the utilities. On appeal this court reversed the action of the court below, saying:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

See also—

Claiborne County v. Brooks, 111 U. S. 400;

Williams v. Eggleston, 170 U. S. 304;

Hunter v. Pittsburgh, 207 U. S. 161;

Old Colony Trust Co. v. Omaha, 230 U. S. 100;

Pacific Livestock Co. v. Oregon Water Board, 241 U. S. 440;

New York & Queens Gas Co. v. McCall, 245 U. S. 345;

Maguire v. Reardon, 255 U. S. 271;

Opelika v. Opelika Sewer Co., 265 U. S. 215;

Old Colony Trust Co. v. Tacoma, 230 Fed. 389.

Now, how does the Department attempt to avoid the application of the rule stated in the foregoing cases? In the instant case no attempt at all is made. However, in the companion case of *The Home Tel. & Tel. Co. of Spokane v. John C. Denney et al* (No. 151), it is asserted that that case falls within an alleged exception to the rule we invoke, and the cases of *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, and *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, are relied upon as sustaining that view. But both of the cases cited involve private contract rights which had accrued prior to the decisions of the state courts. Neither of these cases involved the construction of a statute whereby the governmental power to regulate, subject to which a franchise had been granted, was taken away from a municipality and vested in another agency of the state.

Neither of the cited cases is, therefore, in point.

But if we view this cause from a somewhat different angle, nevertheless the same conclusion must follow.

For the sake of illustration, let us take the situation in Seattle. We readily agree that when the Independent Telephone Company in 1911 applied for rates in excess of those specified in the franchise, the Railroad Commission of Washington was not compelled to act on that application. But if it did act, what was its duty? Practically the whole purpose of regulation is to secure adequate service and to fix fair rates. It will not be questioned that a fair rate is one which is just, reasonable and sufficient. But if the regulatory body does not have the power to "terminate"—put an end to—rates which are unjust, unreasonable and insufficient, even though specified in a franchise, how can the purpose of regulation be carried out?

The construction, therefore, placed upon the statute by the Washington Supreme Court that it was "the duty of the Commission to the Company to fix a rate which was sufficient" (119 Wash. at p. 112) and that an order establishing rates at variance with franchise rates terminated such franchise rates is not only a reasonable, but also a sound construction of the statute.

Now, even in a case in which the Federal courts may exercise an independent judgment, the settled rule is that any reasonable doubt will be resolved in favor of that construction of a state statute which has been adopted by the court of last resort in the state.

In *Yazoo & Mississippi Val R'd. Co. v. Adams*, 181 U. S. 580, 582, it is said:

"The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24 of that year, are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state. *Burgess v. Seligman*, 107 U. S. 20; *Flash v. Conn*, 109 U. S. 371, 379; *Clark v. Bever*, 139 U. S. 96; *Board of Liquidation v. Louisiana*, 179 U. S. 622."

Again, in *Sim v. Edenborn*, 242 U. S. 131, 135, this court said:

"This court has many times considered how far federal tribunals, when undertaking to enforce laws

of the states, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. This has been often reaffirmed."

See also—

Barnum v. Okolona, 148 U. S. 393;

Kuhn v. Fairmont Coal Co., 215 U. S. 349.

THE DEPARTMENT WILL NOT BE HEARD TO CONTROVERT THE CONSTRUCTION OF A STATE STATUTE AND A RULE OF PUBLIC POLICY ANNOUNCED BY THE COURT OF LAST RESORT OF THE STATE

Section 10379 is now and always has been a part of the regulatory law of the State of Washington. It is a part of the Act by which the regulatory body of that state was created. It is solely by virtue of that Act that the Department exists. Every particle of the power and authority of the Department is derived solely from that statute.

Now, on what conceivable theory may the Department, an agency of the state, say that the court of last resort of that state has misconstrued the very stat

ute which gives existence to the Department and from which is derived all its power and authority?

As we see it, this court has twice held that it is not open to an agent of the state to attack the construction put by the court of last resort of that state upon the statute creating such agent.

"And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 546.

"Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the state, he yet attempts to resist one of its laws. Whether he may do so is purely a local question."

Stewart v. Kansas City, 239 U. S. 14, 16.

Respectfully submitted,

H. D. PILLSBURY,
FRANK T. POST,
OTTO B. RUPP,
Solicitors for Respondent,

C. M. BRACELEN, ESQ.,
Of Counsel.

[redacted]

Supreme Court of the United States

[redacted]

No. [redacted] 151

JOHN C. DENNEY, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON; O. O. CALDERHEAD, AS SUPERVISOR OF TRANSPORTATION OF WASHINGTON; C. REA MOORE, ETC., ET AL., APPELLANTS,

vs.

[redacted] TELEPHONE AND TELEGRAPH COMPANY

[redacted]

[redacted]

(32,336)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 769

JOHN C. DENNEY, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON; O. O. CALDERHEAD, AS SUPERVISOR OF TRANSPORTATION OF WASHINGTON; C. REA MOORE, ETC., ET AL., APPELLANTS,

vs.

HOME TELEPHONE AND TELEGRAPH COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1927

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 167-E

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation, Plaintiff,

vs.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. Calderhead, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of Washington, Defendants

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT—Filed May 21, 1925

To the Honorable Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Home Telephone and Telegraph Company of Spokane, a corporation organized and existing under the laws of the State of Washington, by consent, brings this its [fol. 3] Amended and Supplemental Complaint against the said defendants and thereupon complains and charges as follows:

I

That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having its principal place of business at Spokane in said State, and is a citizen of said State; that during all the times referred to in this complaint it has owned and operated and now owns and operates a telephone system, and has been and is now engaged in operating and conducting

a public telephone system in the City of Spokane and the territory adjacent thereto, referred to herein as the Spokane Exchange, and furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service. That it has complied with all the laws of the State of Washington relating to corporations, has paid its annual license fee last past due, and is duly authorized to do business in said State.

II

That heretofore, to wit: on the 24th day of April, 1923, this plaintiff duly filed its original complaint in this Honorable Court against E. V. Kuykendall as Director of Public Works of the State of Washington, Hance H. Cleland as [fol. 4] Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons then constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington.

III

That the defendant John C. Denney is now the duly appointed, qualified and acting Director of Public Works of the State of Washington and is a citizen and resident of the Western District of Washington; that O. O. Calderhead is now the duly appointed, qualified and acting Supervisor of Public Utilities of the State of Washington, and is a citizen and resident of the Western District of Washington; that said Frank R. Spinning is now the duly appointed, qualified and acting Supervisor of Transportation of the State of Washington and is a citizen and resident of the Western District of Washington; that said John C. Denney and said O. O. Calderhead and said Frank R. Spinning are now the members of and constitute the Department of Public Works of the State of Washington; that the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney General of the State of Washington, and is a citizen and resident of the Western District of Washington.

[fol. 5]

IV

This suit is of a civil nature in equity, and is brought for the purpose of enjoining the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for intrastate telephone service in the City of Spokane and the territory adjacent thereto, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public and in consequence said order seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment to the Constitution of the United States, and is therefore null and void.

The amount in controversy in this suit exceeds the sum or value of $3,000.00, exclusive of interest and costs.

V

That on August 8, 1919, the Public Service Commission of Washington, an administrative body duly created by the statutes of said State, and the predecessor of, exercising like powers as, the said Department of Public Works, made [fol. 6] an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, in the Spokane Exchange. A copy of said rates is filed herewith, marked Exhibit "A" and hereby specially referred to and made a part hereof.

VI

That on September 20, 1922, plaintiff filed with the said Department a schedule of rates increasing the rates to be charged by plaintiff for exchange telephone service in said Spokane Exchange. A copy of said schedule is filed herewith, marked Exhibit "B" and hereby specially referred to and made a part hereof.

VII

That on September 24, 1922, the said Department issued an order suspending for the full statutory period the opera-

tion of said rates so filed by plaintiff on September 20, 1922.

VIII

That subsequent to the dates herein before mentioned said Department held hearings in the City of Spokane for the purpose of determining the value of plaintiff's property used and useful in rendering telephone service therein; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said exchange; and the reasonableness or unreasonableness of the schedule of ex- [fol. 7] change rates for the Spokane Exchange filed by it as aforesaid on September 20, 1922. That on the 31st day of March, 1923, said Department made an order, a copy of which is filed herewith, marked Exhibit "C" and hereby specially referred to and made a part hereof, determining the value of plaintiff's property used for the public convenience in rendering telephone service in the Spokane Exchange as of June 30, 1922. That on the 31st day of March, 1923, two of the three members of said Department made an order, a copy of which is filed herewith, marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby the application of plaintiff to increase its rates for telephone service in said Spokane Exchange was denied. That on the same date, to wit: March 31, 1923, the Supervisor of Public Utilities and a member of said Department, who was present at all of said hearings, filed a dissenting opinion, a copy of which is filed herewith marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates then and theretofore being charged by plaintiff in its Spokane Exchange were unreasonable and less than sufficient, and in which he fixed certain rates as reasonable and not more than sufficient. That said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in [fol. 8] said dissenting opinion, Exhibit "E," are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff in its original complaint, filed in this cause, proposed to establish and make effective pending the final decree in this cause, and which rates the plaintiff, under a certain injunctive order hereinafter re-

ferred to, did establish and make effective on August 1, 1924, as hereinafter set forth.

IX

The cost to plaintiff of its property in the Spokane Exchange (land being included at present value) and used or useful in furnishing intrastate and interstate telephone service to the public therein, and exclusively devoted to the rendition of that service was, as of the 30th day of June, 1922, the sum of $4,056,215, and that said cost is substantially the rate base fixed for said plaintiff (as of June 30, 1922) by the Department of Public Works in its said order of March 31, 1923.

X

The cost to plaintiff of its property in the Spokane Exchange (land being included at present value) and used or useful in furnishing intrastate telephone service to the public therein and exclusively devoted to the rendition of that [fol. 9] service was, as of the 31st day of December, 1922, the sum of $4,073,399.

The cost of reproduction of said property as it existed on the 31st day of December, 1922, was the sum of $7,793,411.

The cost of reproduction of said property, less depreciation, was, as of the 31st day of December, 1922, the sum of $7,145,314.

The fair and reasonable value of said property was, as of December 31, 1922, the sum of $5,497,049.

The foregoing statement as to the cost to plaintiff of said property includes nothing on account of the item of franchise or the item known as "going concern" value, but said latter item has been considered in the cost of reproduction and the fair and reasonable value of said property.

XI

The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

XII

Plaintiff's telephone business in the Spokane Exchange has been conducted efficiently and economically during all [fol. 10] the times herein referred to. Plaintiff's net earnings derived from its intrastate telephone business within the Spokane Exchange as stated in rate per cent annual return on the cost of the property on the one hand, and on the fair value thereof on the other, said property being used or useful in furnishing said intrastate service and exclusively devoted to the rendition thereof, during each of the years stated below, have been as follows:

	On cost	On fair value
1919	2.99%	2.17%
1920	1.81%	1.32%
1921	2.38%	1.74%
1922	3.17%	2.34%

That at all of the dates aforesaid the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XIII

That the rates of plaintiff in the Spokane Exchange established and in force as herein set forth during the years 1919, 1920, 1921 and 1922 and which were in effect under the order of the Department of Public Works of March 31, 1923, until July 23, 1924, when under an injunctive order hereinafter referred to, a schedule of rates filed herewith and marked Exhibit "F" were established, were and are not compensatory and were and are less than just and reasonable rates; that the amounts by which the net revenues [fol. 11] derived by the plaintiff from its intrastate telephone business in the Spokane Exchange were less than 8 per cent of the cost of the property on the one hand, and on the fair value thereof on the other, said property used or useful and exclusively devoted to the rendition of that service, were for the years:

	On cost	On fair value
1919	$188,809	$302,761
1920	233,681	347,572
1921	215,516	329,408
1922	192,892	306,784

That the maintenance of the rates and charges as aforesaid in Exhibit "A" under the order of the said Department of March 31, 1923, did compel and, if said rates were re-established, would compel the plaintiffs to provide intrastate service at rates which were and are not compensatory and which were and are less than just and reasonable, and resulted and, if said rates were re-established, would result, in the confiscation of the property of plaintiff in the Spokane Exchange devoted to public use and used or useful in rendering intrastate telephone service, and deprived, and, if said rates were re-established, would deprive, plaintiff of its property without compensation and without due process of law, and denied, and, if said rates were re-established, would deny to plaintiff the equal protection of the law in violation of the Constitution of the United States, particularly Article V and the Fourteenth Amendment [fol. 12] ther of. That said order of March 31, 1923, is therefore null and void.

XIV

That on the 30th day of April, 1923, plaintiff applied to a statutory court convened as provided for by Section 266 of the Judicial Code of the United States, for a temporary injunction in conformity with the prayer set forth in its original complaint; that on said 30th day of April, 1923, said application was denied.

XV

That thereafter this plaintiff renewed its application for a temporary injunction, and such application was heard by a statutory court convened as provided for by Section 266 of the Judicial Code of the United States, and thereafter such application was granted by said last named court, and a temporary injunctive order, in conformity with the prayer set forth in said original complaint and the prayer in this amended and supplemental complaint, was entered and filed on July 23, 1924.

XVI

That inasmuch as the charges for exchange service are billed in advance and the sum of money generally due monthly for exchange service from each of the subscribers

and patrons of the plaintiff is small it was not feasible or [fol. 13] practicable to make said injunctive order effective as to charges for telephone service until August 1, 1924.

XVII

That at all times after March 31, 1923, and down to the 23rd day of July, 1924 the rates for telephone exchange service prescribed by said order of March 31, 1923, were in full force and effect and were the rates and charges collected by this plaintiff for its telephone exchange service in the Spokane Exchange until August 1, 1924.

XVIII

The cost to plaintiff of its property in the Spokane Exchange (land being included at present value) and used or useful in furnishing its intrastate telephone service to the public therein and exclusively devoted to the rendition of that service was, as of the 31st day of December, 1923, the sum of $4,204,898; and as of the 31st day of July, 1924, the sum of $4,517,382. The fair and reasonable value of said property was, as of the 31st day of December, 1923, the sum of $5,628,549, and as of July 31st, 1924, the sum of $5,941,033.

The foregoing statement as to the cost to plaintiff of said property, as of the dates in this paragraph mentioned, includes nothing on account of the item of franchise or the item known as "going concern" value, but said latter item [fol. 14] has been considered in determining the fair and reasonable value of said property.

XIX

That throughout the year 1923 and from January 1st, 1924, to August 1st, 1924, this plaintiff practiced all reasonable economies consistent with adequate and efficient service to the public; that its net earnings derived from its intrastate telephone business in the Spokane Exchange stated in rate per cent annual return upon the cost of the property on the one hand and upon the fair value thereof on the other, said property being used or useful in furnishing its intrastate telephone service and exclusively devoted to the rendition thereof, during each of the periods stated, were as follows:

	On cost	On fair value
1923	3 88%	2 89%
Jan. 1, 1924, to Aug. 1, 1924, (annual basis)	4 03%	3 04%

That the amounts by which the net revenues derived by the plaintiff from its intrastate telephone business in the Spokane Exchange during each of the periods stated were less than eight per cent of the cost of the property on the one hand and of the fair value on the other, said property being used or useful and exclusively devoted to the rendition of intrastate telephone service in the Spokane Exchange, were as follows:

	On cost	On fair value
1923	$170,959	$284,851
Jan. 1, 1924 to Aug. 1, 1924 (annual basis)	173,038	286,929

[fol. 15]

XX

The cost to plaintiff of its property in the Spokane Exchange (land being included at its present value) and used or useful in furnishing its intrastate telephone service to the public therein, and exclusively devoted to the rendition of that service was, as of the 31st day of December, 1924 the sum of $4,624,812. That the cost to plaintiff of its said property is now somewhat in excess of the cost of said property as of December 31, 1924, on account of the additions and betterments in the meantime made to said property. The fair and reasonable value of said property was, as of the 31st day of December, 1924, the sum of $6,048,462.

The foregoing statement as to the cost to plaintiff of said property as of the date in this paragraph mentioned, includes nothing on account of the item of franchise or the item known as "going concern" value, but said latter item has been considered in determining the fair and reasonable value of said property as in this paragraph stated.

XXI

That throughout the period from July 31, 1924, to December 31, 1924, this plaintiff practiced all reasonable economies consistent with adequate and efficient service to

the public; that plaintiff's net earnings derived from its [fol. 16] intrastate telephone service in the Spokane Exchange stated in rate per cent annual return upon the cost of the property on the one hand and upon the fair value thereof on the other, said property being used or useful in furnishing its intrastate telephone service to the public, and exclusively devoted to the rendition thereof, during said period, were—(annual basis) on Cost, 6.44%; on Fair Value, 4.92%.

That the amounts by which the net revenue derived by plaintiff from its intrastate telephone business in the Spokane Exchange were less than eight per cent of the cost of the property upon the one hand and upon the fair value thereof on the other, said property being used or useful in furnishing said intrastate service and exclusively devoted to the rendition thereof, during the period of August 1, 1924, to December 31, 1924, were (annual basis) on Cost $71,232; on Fair Value, $185,124.

XXII

That plaintiff avers that the rates and charges set forth in said Exhibit "F" and which have been the rates and charges collected by it during the period August 1, 1924, to December 31, 1924, are less than the just and reasonable rates and charges to which plaintiff is lawfully entitled, but are the rates and charges which plaintiff has estab- [fol. 17] lished and put into effect under said injunctive order of July 23, 1924, pending the final decree in this cause.

XXIII

That the plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F" or any rates or charges higher than those specified in said Exhibit "A," or any rates not sanctioned by the Department of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A," and the plaintiff, its directors, officers, agents and employees will be subjected to a multi-

plicity of suits and incr the penalties and punishments prescribed by the laws of the State of Washington, and may, under the provisions of said laws, be charged with the commission of gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000, or imprisonment in a county jail of one year, or both.

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat [fol. 18] of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedules of rates and charges in said Exhibit "F," or any rates and charges other than those provided in said Exhibit "A," and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as hereinbefore alleged.

That unless the defendants are restrained and enjoined, as herein prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A." That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no practical way to enforce and collect its rates and charges except by cutting off and refusing service for default in payment of its bills rendered monthly therefor, and its subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits to restrain plaintiff from cutting off and denying service for such non-pay[fol. 19] ment of bills and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.

That large numbers of suits will be brought by defendants and plaintiff's subscribers and patrons to restrain and enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F," or any schedule other than said Exhibit "A," and

to compel plaintiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A." That the issues which will be presented in each said suit are presented and should and will be decided in this action.

Wherefore the plaintiff prays the judgment and decree of this Court:

First: That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of Public Works, be decreed to be confiscatory, in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect.

Second. That defendants, and each of them, and all other persons be permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and [fol. 20] employees, to observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A" filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges.

Third. That defendants, and each of them, and all other persons be permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from charging and collecting the rates and charges set forth in said Exhibit "F" until just and reasonable schedules of rates and charges are established according to law.

Fourth. That the defendants, and each of them, and all other persons be permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges, Exhibit "A."

Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of subpœna of the United States of America issuing [fols. 21 & 22] out of and under the seal of this Honorable Court, directed to the said John C. Denney, O. O. Calderhead, Frank R. Spinning and John H. Dunbar, commanding them, and each of them, to answer unto this amended and supplemental complaint, but not under oath (answer under oath being hereby expressly waived) and to obey and perform such order and decree in the premises as to the Court may seem proper and required by the principles of equity and good conscience; and the plaintiff will ever pray.

The Home Telephone and Telegraph Company of Spokane, Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Its Solicitors.

Duly sworn to by W. J. Phillips. Jurat omitted in printing.

[fol 23] Exhibit "A"

The Home Telephone and Telegraph Company of Spokane

Exchange Rates—Spokane, Wash., Effective August 1, 1919

W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane, Spokane County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.75
Two-party Line	...	...
Extension (with or without bell)	1.00	1.00
Suburban Service—Two-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.25	3.50
Two-party Line	2.50	2.75
Four-party Line	2.00	2.25
Extension (without bell)	.50	.75
Extension (with bell)	.65	1.00
Suburban Service—Two-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map**

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: April 1, 1919. Effective: April 1, 1919.*

[fol. 24] Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedules

Exchange: Spokane, Spokane County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$3.50	$3.75	100	$ .04
Auxiliary Line	2.50	2.75	...	...
Extension (With or without bell)	.75	.75	...	...

Residence—Measured Service

Individual Line	....	....	....	....
Extension (Without bell)	....	....	....	....
Extension (With bell)	....	....	....	....

Business—Coin Box

	Rate per day		Exchange message per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$ .15	†	3	$ .05
Extension (With or without bell) per month	1.00	1.00	...	...

Residence—Coin Box Service

Individual Line	....	....	....	....
Extension (Without bell) per month	....	....	....	....
[fol. 25] Extension (With bell) per month	....	....	....	....

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

**Opportunity Exchange—Two-mile radius from central office.

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

†25c per month additional.

W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month	
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2 00	
Additional switchboard equipment for each group of 5 lines or less	20	
First bothway trunk line—Individual business rate plus $2.00 per month.		
Each additional bothway trunk line—Rate for first bothway trunk line less 25%.		
Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.		
	Wall set	Desk set
Each Station, primary or extension not in guest rooms (see mileage Rates Section 3)	$1 00	$1 00
Each Station, primary or extension in guest rooms:		
1 to 50, inclusive	50	75
11 to 20, inclusive	45	70
21 to 35, inclusive	40	65
36 to 50, inclusive	35	60
Over 50	25	50

[fol. 26] Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: April 1, 1919. Effective: April 1, 1919.*
Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month	
Switchboard with battery power, ringing circuit and switchboard telephone for each position	None.	
Trunk Lines—Bothway only	None.	
(Enough bothway trunk lines will be provided to properly handle the traffic.)		
Each exchange message	$0 25	
	Wall set	Desk set
Each station, primary or extension not in guest rooms (see Mileage Rates, Section 3)	$1 00	$1 00
Each station, primary or extension in guest rooms:		
1 to 10, inclusive	50	75
11 to 20, inclusive	45	70
21 to 35, inclusive	40	65
36 to 50, inclusive	35	60
Over 50	25	50

[fol. 27] Minimum installation: Ten (10) stations, excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside primary Rate Area, see Mileage Rates, Section 3.

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 3

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Farmer Line Service

Total Number of Stations

	Rate per year
300 stations or less	$3 00
300 to 500 stations	3 60
500 to 750 stations	4 20
750 to 1,000 stations	5 40
1,000 to 2,000 stations	7 20
2,000 to 4,000 stations	8 40
4,000 to 6,000 stations	9 60
6,000 to 8,000 stations	10 80
8,000 to 12,000 stations	12 00
12,000 stations and over	15 00

Company Furnishes—For not less than 5 subscribers per circuit, switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes [fol. 28] facilities to city or town limits. Complete tele-

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

phone and battery, sub-station protection. Maintenance of above.

The subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers will be subject to a Ten Per cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

[fol 29] EXHIBIT "B"

The Home Telephone and Telegraph Company of Spokane

Exchange Rates—Spokane, Wash. Filed September 20, 1922, and Not Withdrawn

W. U. P. W. No. 3, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane and Opportunity, Spokane County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (With or without bell)	1.00	1.25
Suburban Service—Ten party Line (see Section 3)	3.50	3.75

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (With or without bell)	.75	1.00	...	...

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

[fol. 30] Semi public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	$*	$ .05
Extension (with or without bell) per month	1.00	1.25	..

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two Party Line	3.25	3.50
Four party Line	2.75	3.00
Extension (With or without bell)	.75	1.00
Suburban Service—Ten party Line (see Section 3)	3.00	3.25

Primary Rate Area—See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

*Opportunity Exchange—Two mile radius from central office.

Farmer Line Service (See Section 3), each station $15.00 per year.
Issued: October 2, 1922. Effective: November 1, 1922.
Cancels and Supersedes Exchange Rates Schedule effective April 1, 1919.
G. A. Walker, Assistant Secretary.

W. D. P. W. No. 3, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule—Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private branch exchange service subject to the following conditions:

[fol. 31] (a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

(b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

*25¢ per month additional.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission, supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchange service at published rates.

(2) To pay the hotel a commission on exchange interexchange messages originating at guest room and lobby stations and charged to the hotel.

Switchboard with battery power ringing circuit, position dial, switchboard telephone, each position:

	Rate per month
Cordless type	$3 00
Non-multiple cord type:	
10 lines or less in use	5 00
11— 30 lines in use	6 00
31— 60 lines in use	7 00
61—100 lines in use	8 00
101—150 lines in use	9 00
151—200 lines in use	10 00
201—260 lines in use	11 00
261—320 lines in use	13 00
Multiple cord type:	
Each position with not to exceed one multiple jack per line	15 00
[fol. 32] Each additional strip of ten multiple jacks or portion thereof	30

(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:

		Rate per month
Each station without dial	Wall Set	1 00
	Desk Set	1 25
Each station, with dial	Wall Set	1 25
	Desk Set	1 50

Stations outside premises in which switchboard is located, see Mileage Rates—Section 3:

(b) Stations in guest rooms and lobby:

Each station, without dial	Wall Set	50
	Desk Set	75
Each station, with dial	Wall Set	75
	Desk Set	1 00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

(c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management.

Outgoing trunk lines only.

Individual line business unlimited rate.

Tie lines between separate switchboards—See Mileage Rates, Section 3.

Bothway trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the cen [fol. 33] tral office shall be five cents except that in those cases where the additional service rendered the public as the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accepted by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations cannot be connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate area, see Mileage Rates, Section 3.

Issued: October 2, 1922. Effective: November 1, 1922. Cancels and Supersedes Exchange Rate Schedule effective April 1, 1919.

G. A. Walker, Assistant Secretary.

[fol. 34] EXHIBIT "C"

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

No. 5344

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

Order Relating to Valuation of the Home Telephone and Telegraph Company of Spokane

General Statement

This matter arose thru the necessity for determining the valuation of the telephone property of The Home Telephone and Telegraph Company of Spokane (hereinafter referred to as the respondent) as a step in the department's

state wide investigation of the telephone situation initiated by its complaint in this cause dated January 21, 1922.

Hearings in this cause, pursuant to notice duly given, were held before the department in Olympia, December 18, 1922, and in Spokane on January 22, 1923, and February [fol. 35] 28, 1923, at which hearings the department, the City of Spokane, the respondent and other parties were represented, witnesses were sworn and examined, documentary evidence was received, briefs being submitted and the department now being fully advised in the premises makes and enters the following findings of fact and order:

Findings of Fact

I

That The Home Telephone and Telegraph Company of Spokane was organized January 19, 1905. As of June 30, 1922, the date to which all of the following findings refer unless otherwise specifically mentioned, it is found to be owning and operating the telephone exchange plant within the City of Spokane and the rural territory immediately adjacent thereto, together with certain toll lines and facilities within the City of Spokane whereby respondent's subscribers may be connected to the toll lines of the Pacific Telephone and Telegraph Company at the city boundaries.

II

The respondent by means of the property owned and operated by it renders telephone service to the citizens of Spokane for hire and it is therefore a public service com- [fol. 36] pany subject to the laws governing the regulation of all such companies by this Department.

III

For a time prior to 1915 two telephone companies operated in Spokane, one, the respondent, known as the "Home" or "Independent" company and the other, the Pacific Telephone and Telegraph Company, sometimes referred to as the "Pacific" or "Bell" company. During the year 1914 the Pacific Company acquired the capital stock of the Home Company and on January 18, 1915, sold its

Spokane properties to the latter. The consideration in this transaction was as follows:

Thirty year 5% 1st Mortgage Bonds of the Home Company	$1,338,000 00
6% Promissory Note of the Home Company	1,147,927 66
Cancellation of Pacific Company indebtedness to the Home Company	329,600 00
Total	$2,815,527 66

The property conveyed by the Pacific Company is subject to a mortgage given to secure an issue of bonds of the Pacific Company amounting to $35,000,000. The proportion of such indebtedness secured by the property conveyed was $1,500,000. The two properties were consolidated with the result that since 1915 only one company, the respondent, has given telephone service in Spokane. The Pacific Com- [fol. 37] pany, thru its stock ownership of the Home Company, controls the operations of the respondent. In practical effect this situation places Spokane in the relation of an exchange of the Pacific Company.

IV

The cost of construction and equipment of the property embraced in the fixed capital accounts as derived from the books and records of respondent is $3,946,642.74. This figure differs from the amount now carried by the respondent on its books, which with minor adjustments is $3,467,675.01 and was obtained by adding the net additions since January 1, 1915, to a starting figure as of that date composed of the full book value of the Fixed Capital Accounts of the Home Company plus the "Structural" or "Physical Condition" book value of the Pacific Company. The first figure stated above is derived from a starting figure as of the date of the consolidation composed of the actual book cost figures of the Fixed Capital Accounts of both companies. An amount of $2,116,247.69 carried by the respondent as "Miscellaneous Investments" is not considered in the above figures. The amount of $3,946,642.74, above stated, embraces all of the Fixed Capital Accounts, both exchange and toll, representing property owned by the respondent both used and not used for the public convenience.

[fol. 38] It therefore includes certain items of plant acquired in the consolidation, that should be eliminated from consideration in a rate base as not being used for the public convenience. This non-used plant will hereinafter be itemized in detail.

V

The present cost of construction, or what is the same thing, the cost of reproduction, of the respondent's telephone property used and useful for the public convenience, is $6,900,000. This amount was arrived at by applying to an actual field inventory of plant units embraced in the Fixed Capital Accounts as of June 30, 1922, unit prices derived from a price trend study over a principal construction period of three years, subsequent to the date of the inventory.

VI

The cost of reproduction of the property embraced in the fixed capital accounts, less accrued depreciation is $5,900,000. The property is found to be in approximately eighty-five per cent physical condition.

VII

The outstanding capital stock of respondent, all of which, with the exception of directors qualifying shares, is owned [fol. 39] by the Pacific Telephone and Telegraph Company, amounts to a par value of $1,250,000, consisting of 12,500 shares of a par value of $100 each. The market value of this stock cannot be ascertained, there being no recent transactions to indicate its value.

VIII

The funded debt of respondent consists of an issue of First Mortgage 5 per cent, 30 Year Gold Bonds, to the par value of $3,000,000. There is no evidence to indicate the market value of these bonds.

IX

The respondent has never paid any dividends on its capital stock.

X

As indicating the earning capacity of the respondent it is found that for the first six months of the year 1922 the telephone operating revenues were $607,131.64 and for the same period the telephone operating expenses, taxes, uncollectible revenue, and license contract payment as shown on the company's books amounted to $542,576.22.

[fol. 40] XI

The territory served by respondent comprises 43.7 square miles, containing a population of approximately 124,580. The company serves 31,257 exchange stations. The density of population is 285.2 per square mile and the percentage of telephone development (ratio of stations to population) is 25.11 per cent. The use of the telephone, as indicated by the number of calls per capita per year, is 490.56.

XI

We find that the expenditures made by the respondent and its predecessors were such as were justified by the then existing conditions and conditions that might reasonably be expected in the immediate future. Likewise, the money expended has been reasonable for present needs and for the needs of the immediate future.

The property as it is found at this date is the result of the merger of two telephone plants as described in Finding III, and in view of that fact it is inevitable that some duplications of facilities would be found. During the period elapsing since consolidation most of these duplications have been eliminated. However, at the present time it is found that certain property, the book cost of which is included in the amount stated in Finding IV, is either not useful in the [fol. 41] public service or is not at the present time used for the public convenience. The land and buildings comprising old automatic offices B and C, the value of which, not including omissions but including interest during construction, is $12,020.01, are not and cannot be used in the public service. They are therefore excluded from the rate base which will be hereinafter found.

Certain underground plant was found not in use at the

time of the inventory and a portion of this plant is so situated that it is admitted by the company it will never be used in the public service. The following table shows the items of plant just described:

Item	Potentially useful	Not useful
Exchange Underground Conduit duct ft	172,882	8,320
Manholes, number	78	7
Exchange Underground, Cable, wire Mi.	1455.50	0

The value of the foregoing "not useful" plant excluding omissions but including interest during construction, is $5,025.63, which makes a total of $17,045.64 worth of property included in the company's fixed capital accounts which should be eliminated as not now and not likely to be useful in the public service.

[fol. 42] The value of the foregoing underground plant which is classified as "potentially useful in the public service" is $109,866.50. From the evidence submitted we find that approximately $20,000.00 worth of this plant should be regarded as properly includible in the rate base since it is in the nature of a reasonable surplus of plant which prudence dictates that all utilities should have. The balance, or $89,866.50, should not be included in a rate base fixed as of June 30, 1922, but the company is entitled to have such portions of this plant in excess of the $20,000.00 before mentioned as may in the future be placed in active service, included in subsequent rate bases. The facts with respect to this matter can be determined when necessary by using the detailed inventory of this plant to be found in the exhibit submitted by our engineers.

XIII

The respondent submitted what it designated an "Actual Performance Appraisal" of its properties. This is the same method of appraisal followed in the state wide valuation of the Pacific Company on which an order was issued in Cause No. 1810 1825 in 1916. The inventory from which the appraisal was made was carefully checked by our engineers and the unit prices applied to the inventory in order to arrive at the appraisal amounts were likewise

checked. These unit prices may be broadly described by the [fol. 43] term "Historical Prices." They are derived from an analysis of the cost records of the work actually done by the company in constructing the property being appraised. They are actual performance costs applying to the greater portion of the units covered by the inventory. Hence an appraisal on this basis should agree closely with the book cost of property. Excluding the respondent's allowance for omissions from the actual performance appraisal, it is found that it is lower than the adjusted book cost of property by a relatively small amount.

There was some contention over the allowance of an item termed "Omissions" included by the respondent in its appraisal figures. The amount involved is $74,587.65, of which $318.69 relates to the non useful property and $2,198.13 relates to the potentially useful property, all of which is listed in Finding XII, and which the company estimates should be allowed for omitted items. The Department's engineers took the position that a thorough check of the inventory had disclosed that it was accurate to a high degree and that the method of deriving unit prices fully covered any contingencies, therefore this item could reasonably be excluded, and it is excluded from the actual performance appraisal figures and rate base in this order.

The cost of construction and equipment of the property embraced in the fixed capital accounts, estimated by the [fol. 44] company on the actual performance basis not including the non-useful property but including the potentially useful property is as follows:

Intangible Capital:	
Organization	$1,200.00
Exchange Plant:	
Exchange Right of Way	10,087.59
Land	121,451.68
Buildings	433,653.17
Central Office Equipment	665,990.38
Station Apparatus	191,237.70
Station Installations	167,877.82
Interior Block Wires	6,634.73
Private Branch Exchanges	168,905.84
Booths and Special Fittings	1,965.93
Exchange Pole Lines	376,027.78
Exchange Aerial Cable	438,855.92
Exchange Aerial Wire	206,351.54
Exchange Underground Conduit	533,544.19
Exchange Underground Cable	391,859.06
Interest During Construction	47,031.73
Total	$3,761,475.06
Toll Lines:	
Toll Right of Way	175.24
Toll Pole Lines	24,704.52
Toll Aerial Wire	23,827.53
Toll Underground Conduit	205.33
Toll Underground Cable	25,371.90
Interst During Construction	1,099.41
Total	$75,383.93
[fol. 45] **General Equipment:**	
Office Furniture and Fixtures	28,971.27
General Store Equipment	155.28
General Stable and Garage Equipment	29,338.04
General Tools and Implements	13,357.37
Total	$71,821.96
Grand Total	$3,909,880.95

XIV

Some of the amounts stated in fixed capital accounts of respondent are not satisfactory as indicating the actual or true cost of the property included thereunder. The actual performance appraisal accounts as listed in Finding XIII are believed to indicate reliably the facts as nearly as they may be determined and respondent may, if it elects and obtains the necessary permission from the Interstate Commerce Commission, adjust its fixed capital accounts and set them up in accordance with the values in Finding XIII.

XV

The Working Capital, as distinguished from Fixed Capital, required by respondent in conducting its business, amounts, as an average for the first six months of 1922, to $68,867.74. This amount is made up of accounts as follows:

[fol. 46] Cash	$10,628 60
Employees Working Funds	6,091 83
Due from Subscribers and Agents	36,267 91
Materials and Supplies	15,879 40
Total	$68,867 74

"Cash" includes the amounts of current funds available for use on demand. "Employees Working Funds" include amounts advanced to employees from which expenditures are made and subsequently accounted for. "Due from Subscribers and Agents" includes amounts due the company on account of services rendered. "Materials and Supplies" include the cost of unapplied material, including the value of materials temporarily in use but not charged out in the company's accounts and other supplies and approximate charges applicable thereto.

The foregoing amounts are reasonable and the total should be included in the Rate Base upon which respondent is entitled to earn a reasonable return.

XVI

The item of Construction Work in Progress as of June 30, 1922, amounts to $3,117.81. This amount should be in-

cluded in the Rate Base, but due allowance in computing a rate of return must be made by treating the accruals for interest during construction as a part of Income, adding the same to Operating Income before computing the rate of return.

[fol. 47]

XVII

All of respondent's property is located within the State of Washington. Such interstate business as it transacts is toll or long distance business over the lines of other telephone and telegraph companies and it is not feasible to make any segregation of its operations as between intrastate and interstate business.

XVIII

The respondent submitted an exhibit to show that the "Fair Value" of its property was $5,500,000. The exhibits of the Department's engineers and experts for the City of Spokane discussed "Rate Bases" ranging around $4,000,000 and lower. Counsel for the City of Spokane, in his memorandum on the valuation of this property analyzes the exhibits of his experts and contends for the following formula to determine the rate base:

To the value of the Pacific (Manual) Company's property fixed by the Commission as of December 31, 1914—

Add the book accounts relating to the Home (automatic) Company's property when the plants were consolidated.

Add net additions to plant, cash, employees working funds, and materials and supplies.

Deduct value of property not actually in use.

[fol. 48] This gives him a figure of $3,864,081.51 which he states is the "actual investment of the company in use." He then assumes the property to be in 90 per cent condition from which he obtains $3,477,673.36, which is the amount he contends for as the rate base.

The Department's engineers submitted an exhibit which, at page 13, shows a rate base using the same formula. The amount arrived at by using the figures of our engineers which differ somewhat from those of counsel, eliminating the nonuseful property and all but $20,000 of the poten-

tially useful property, is $3,958,081.66. This amount includes working capital and construction work in progress.

The method of using the depreciated value of the actual investment in property advocated by counsel for the City of Spokane has never been adopted by this Department, nor so far as we are aware, do other regulatory bodies regard it with favor. The "cost of reproduction less depreciation" method is used by some, and with some reason as indicating—on a purely physical basis—the "present value" of a property. It has been previously found herein that this amount in this case is $5,900,000. But to our mind the determination of a rate base is a broader problem, including as it does, a variety of factors that must be given consideration. We are of the opinion that there [fol. 49] is nothing in the record to justify us in departing from our usual and well established procedure in weighing the several matters and things prescribed by our Public Service Commission law as affecting value. All of these, which are ascertainable from the record, have been set out in the foregoing findings; wherefore, after giving due consideration to all of the matters and things specified by law as tending to show the value of the property used by the respondent for the public convenience, said value is found to be $3,892,000.00 as of June 30, 1922.

Order

From a consideration of the foregoing facts, the Department concludes and its order is that the value of respondent's property used for the public convenience in rendering telephone service in Spokane as of June 30, 1922, be, and the same is hereby fixed at $3,892,000. Upon this value respondent is entitled to earn a reasonable return, and said value shall hereafter, with net additions, be used as the rate base for this utility, to which may be added the value of underground plant hereafter placed in actual use, after such value exceeds the amount of $20,000 herein allowed.

[fol. 50] Witness the Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, by E. V. Kuykendall, Director. Hance H. Cleland, Supervisor of Public Utilities. Frank R. Spinning, Supervisor of Transportation.

Attest: J. H. Brown, Secretary.

[fol. 51]

EXHIBIT "D"

Findings of Fact, Order, and Opinion, Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON EX REL. The City of Seattle, The City of of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY AND HOME Telephone and Telegraph Company of Spokane, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Woman's

[fol. 52] Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and Kings County could only be made, legally, after the filing of a formal complaint, and investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the state of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in cooperation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

[fol. 53] Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking co-operation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together with our own engineering and accounting staff,

worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington. [fol. 54] On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed [fol. 55] to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses

who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26 at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing [fol. 56] the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

[fol. 57] All these complaints were consolidated for the purpose of hearing and the hearings were joint hearings

under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each.)

[fol. 58] Findings of Fact

I

Rate Base

Finding:

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion:

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original valuation proceeding.

As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the [fol. 59] valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and

Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two [fol. 60] items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance

[fol. 61] sheet account, is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in prog- [fol. 62] ress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly

in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more [fol. 63] or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include the interest ac- [fol. 64] cretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the

company if it be less, than the rate of return from operations.

II

Depreciation

Finding:

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two years from April 1st, 1923.

Discussion:

One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

[fol. 65] Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replacements, has been $20,137,489.00, leaving a balance of $21,074,718.00, less certain expenditures for extraordinary repairs and other unusual items. In other words, the replacement expenditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the State of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating

this to State of Washington on the basis of plant values, the balance for Washington was $2,418,457.00. Had the company adopted a three and one-half per cent rate of depreciation at the beginning of the year 1915, and debited the de-
[fol. 66] preciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits to the depreciation reserve, for Washington, and debiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or nearly one-third of the depreciable plant value.

We have found the property of respondents in the State of Washington to be about 85 per cent physical condition. Under the view expressed by the witness referred to, the depreciation reserve should be approximately 15 per cent of the depreciable property, where the same is found to be 85 per cent physical condition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balances, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922, B. P. 553, decided by Wisconsin Railroad Commis-
[fol. 67] sion, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

"It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one-half per cent of the depreciable property would have, so far as experience at present shows, been ample to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this dis-

cussion relates. The use of three and one-half per cent for the purpose of this case is based upon the assumption that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, dur- [fol. 68] able and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any saving in the way lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply justified. In the Wisconsin case the reduction was not limited to a specified period.

Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties, under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, [fol. 69] which would be binding upon a state regulatory body in the regulation of purely intra state traffic, we believe that the results of this investigation will be of immense value in arriving at correct methods of determining depreciation and for this reason have limited the rate herein

prescribed to a two year period. The final determination of the I. C. C. should be announced within that time.

We are convinced, that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to reduce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than necessary, and we are merely reducing the flow until the proper level is reached.

[fol. 70] III

The Four and One-half per Cent Contract Licensee Revenue, Dr.

Finding:

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

Discussion:

This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent

of substantially all of their gross operating revenue for certain rights and services. We have no power to prevent any public utility from entering into a contract with a parent company to share with it any portion of its profits. [fol. 71] We have the right, however, to say whether such share or any part thereof shall be treated as an operating expense. Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value of the service rendered or the reasonable rental of the equipment furnished rather than upon a percentage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one half per cent of the increase will accrue to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of additional revenue, and the local company will receive no more from the parent company than it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It gives rise to suspicions of concealment and dishonesty in every hearing in which it is involved. Not having power to annul it we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual [fol. 72] value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and Telegraph Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned, and present skillful expositions of its provisions, and undertake to justify its existence and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that

establish wholesome public relation should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the public Utilities Commission of Michigan, less than a year ago, the Commission said, "The four and one-half per cent contract between the American Telephone and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arms length but one between the superior and inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its child. . The contract is [fol. 73] in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers, because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them. Under the law of this state the four and one-half per cent contract is at least presumatively void."

Substantially the same relations exist between the respondents in this case and the American Telephone and Telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services [fol. 74] performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone

and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653.00. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allowance of something like two per cent instead of four and one-half per cent as provided in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the [fol. 75] contract is fundamentally wrong and condemned specifically by the Supreme Court of the United States. The company applies the percentage to certain gross revenues received by the applicant. The more revenues the more the charge against revenues for the benefit of the American Company, which method of calculation constitutes a circle,—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate Case (Simpson v. Shepard) 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

In the case of the City of Houston v. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinion 1921 22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made as an operating expense under this contract the results would not differ materially.

[fol. 76] The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

IV

Machine Switching Project

Findings:

We find that the installation of machine switching in Seattle is justified.

Discussion:

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, if any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought by the installation of machine switching. In addition to the somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institution of Electrical Engineers, page 1571, where the following statement appears:

[fol. 77] "Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence today, for this movement is twenty-seven years old. Five exchanges formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expenses is as follows:

	Manual	Automatic
Total operating and maintenance expenses per year	$552,600 00	$136,800 00
Average per line per year	11 77	2 92
Average per telephone per year	8 50	2 11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation. We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result.

The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine switching devices are superior from the standpoint of economy and efficiency. They are [fol. 78] a later and somewhat costlier product, and we assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching device in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economies, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as:

1. Fluctuations in service.

2. Impairment of service by epidemics, strikes, etc.

3. The mistranslation of calling subscribers desires.

[fol. 79] V

Return

Findings:

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

Statement of Operating Income and Rate of Return

Estimate for Year 1923

Revenues

	Present rates	Proposed rates
1. Exchange Service Revenues	$8,042,437 (a)	$8,424,253 (a)
2. Toll Service Revenues	2,730,000 (a)	2,732,358 (a)
3. Misc. Operating Revenues	308,004 (a)	308,004 (a)
4. Total Tel. Oper. Revenue	$11,080,441 (a)	$11,474,615 (a)

Expenses

5. Ordinary Repairs	$1,514,153 (a)	$1,514,153 (a)
6. Station Removals and Changes	267,785 (a)	267,785 (a)
7. Depreciation	1,070,937 (a)	1,070,937 (a)
8. Traffic Expenses	2,042,731 (a)	2,042,731 (a)
9. Commercial Expense	865,011 (a)	865,011 (a)
10. General & Misc. Expense	254,650 (a)	254,650 (a)
11. Rents	79,956 (a)	79,956 (a)
12. Uncollectible Revenues	35,018 (a)	48,307 (a)
13. Taxes	485,017 (a)	658,057 (a)
14. Licensee Revenue—Dr.	161,653 (a)	161,653 (a)
15. Total Tel. Oper. Expense	$7,357,711 (a)	$7,542,903 (a)
[fol. 80] 16. Operating Income	$3,942,727 (a)	$3,931,712 (a)
17. Int. during Constr.—Accrued	148,122 (a)	148,122 (a)
18. Adjusted Operating Income	$4,090,849 (a)	$4,079,834 (a)
19. Rate Base	34,780,625 (a)	34,780,625 (a)
20. Per Cent Earned	6.01	11.73

Note.—The rate base above is the estimated average plant value for year 1923, plus working capital.

Discussion:

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

Whatever saving can be made through the machine switching program, which we feel will soon be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

VI

Existing Rates

Finding:

We find that the existing rates are just, fair, reasonable and sufficient.

VII

Proposed Rates

Finding:

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

[fol. 81]

VIII

Decrease in Rates

Finding:

The evidence does not justify any reduction in rates at this time.

IX

Reparation

Finding:

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

Petition to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King

County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petition to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph [fol. 82] Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

Discussion

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope if not a promise that when conditions returned to normal and the period of inflation had passed rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now comes the respondents when we had dared hope that our predictions might be realized and ask for startling increases. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of popular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted [fol. 83] the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the

Burleson rates and the general telephone rate level has been higher in the State of Washington than in adjoining states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates.

If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

[fol. 84] 2. That the annual depreciation allowance be and the same is hereby fixed at 3½ per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and Telegraph Company under said 4½ per cent contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness the Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, by E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation.

Attest: J. H. Brown, Secretary.

[fol. 85] EXHIBIT "E"

Dissenting Opinion Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works, of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rates regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

[fol. 86] BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON EX REL. the City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME Telephone and Telegraph Company of Spokane, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant; PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic

[fol. 87] Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint, challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company.)

The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a consulting telephone engineer with twenty-seven years' experience in the construction, operation and engineering of independent telephone properties employed by the Department as a special engineer, were forthwith [fol. 88] directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the mayor, council or commission and city attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations co-operate with us in this work, rendering such aid or assistance as possible. These letters and complaints were

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mailed to the authorities of more than one hundred cities and towns.

On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently and on or about March 31, 1922, the [fol. 89] City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case, Mr. E. D. Ridley, a well qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

Mr. Ridley and Mr. L. P. Hockett, utility engineer and accountant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check, examination and survey was made in the State of Washington, particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent telephone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

[fol. 90] On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules, proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedule as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to [fol. 91] the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some some cross examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified [fol. 92] at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place. The [fol. 36] greater part of these notices were sent to business and professional men in the city of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although some 2,300 notices of hearings and personal letters were written to these complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration, and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce, namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane some thirty five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel engineers and accountants.

[fol. 94] The investigation and hearings in this case have been the most comprehensive ever made by the Public Service Commission or the Department of Public Works of Washington and have extended over a period of 14 months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of closest cooperation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents, data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities, with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane, stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Public Works showed a spirit of cooperation with Spokane and [fol. 95] Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

Findings of Fact

I

Rate Base

Finding:

The value of the telephone properties of the Pacific Telephone and Telegraph Companies in the State of Washington, including the Spokane Exchange, used and useful in public service was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base of that date.

Discussion:

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,080,080. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On ac- [fol. 96] count of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

[fol. 97] Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making

purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value of rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the [fol. 98] rate base, particularly in Seattle where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base, but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

[fol. 99] "A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the company, no consideration is given to the interest earnings of funds employed in construction work in progress, while, under the method first proposed by the Department's engineers, consideration was not given to the fact that if the company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an [fol. 100] allowance for cash materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds

employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving and earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

[fol. 101] The rate of return from operation seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating income the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more and the company if it be less, than the rate of return from operations.

Rate of Returns—(Earnings)

Findings:

That under the rates applicable during the past seven years the Pacific Telephone and Telegraph Company in the State of Wash[illegible]ton, after paying operating expenses, taxes, licenses to some debtor, and setting aside depreciation, has shown an annual rate of return as follows:

							1-1 to 6-30-22
1915	1916	1917	1918	1919	1920	1921	
1.84%	3.40%	3.31%	3.13%	4.67%	4.08%	3.52%	3.35%
							(annual)

and that said rate of return during the entire period has been unfair, unjust, unreasonable and less than sufficient.

[fol. 102] That the estimated rate of return of the Pacific Telephone and Telegraph Company for the State of Wash-

ington for the year 1923 under the rate proposed by the Companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

That under the rates fixed and allowed by this order, the rate of return will be 7.37 per cent upon the rate base herein established.

Discussion:

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximating 8% upon the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in the telephone plant. As testified on cross examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depending upon the nature or class of business in which the investment was made.

[fol. 103] For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921, and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[fol. 104] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052 82	$8,114,245 13	$4,165,420 49
Deductions from Revenues:			
2. Telephone Operating Expenses (excl. Dep.)	4,716,709 05	5,043,458 88	2,573,994 76
3. Taxes Assignable to Operations	690,045 53	543,449 27	262,310 90
4. Uncollectible Operating Revenues	17,321 26	29,028 68	17,961 75
5. Depreciation (on Depreciable Property)	1,177,358 87	1,321,585 78	727,295 13
6. Licensee Revenue—Dr.	327,106 58	342,658 03	173,421 04
7. Total Deductions from Revenue	$6,838,741 29	$7,280,180 64	$3,754,083 58
8. Operating Income	915,311 53	834,064 49	411,336 91
9. Interest during Construction	17,959 48	90,491 52	97,965 71
10. Adjusted Operating Income	$933,271 01	$924,556 01	$509,302 62
11. Rate Base (Incl. C. I. P.)	22,821,159 54	26,232,691 37	30,425,113 89
12. Rate of Return	4 09%	3 52%	3 35%

NOTE.—Line 11—Amounts are average for the period hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 105] 1. Telephone Operating Revenues.—This the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses. (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The Department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reverse our former holding and practice in this regard, and to follow the law as definitely settled by the courts, which is, that federal income tax is properly deductible from operating revenues.

Consolidated Gas Company of New York v. Newton, 267 Federal 231.

[fol. 106] Newton v. Consolidated Gas Company, 42 Supt. Ct. 264.

Galveston Electric Company v. Galveston, 66 Law Ed. 382.

Reduced Rates 1922—I. C. C. 683.

4. Uncollectible Operating Revenues.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciations (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce

Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, catastrophies, etc. These charges are carried to a depreciation reserve, and the costs of all replacements of plant units, instead of being included in the ordinary repairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual [fol. 107] charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage necessary in the case of another exchange, due to a possible difference in the character of the physical property contained in each; yet at the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of a state, where climatic and other conditions are not the same.

The question here involved and to be determined is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

Companies	5.75%	
City of Seattle	5.88%	(exchange plant only)
Department's Engs.	5.25%	

[fol. 108] In Case No. 4747, Public Service Commission of Washington et al. v. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the com-

pany at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Case No. 4747, depreciation percentages were allowed by us in the following cases:

Cause No. 5040, City of Port Angeles v. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club v. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

Cause No. 5127, Commission v. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 commission decisions and eight court decisions.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies gen- [fol. 109] erally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.29% to a maximum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty case the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 5.972%. It will also be noted that in ninety of the 112 cases reported the depreciation allowance fell between 5% and 7%.

[fol. 110] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5 50
Arizona	PUR1920B	411	6 00
Arkansas	PUR1921B	516	6 40
California	PUR1915F	1014	5 50
California	PUR1922A	853	5 50
California	PUR1922C	97	3 28
Colorado	PUR1917B	198	5 65

Jurisdiction	Citation		Rate fixed
Georgia	PUR1921C	833	5 11
Hawaii	PUR1921B	209	6 80
Idaho	PUR1916C	438	6 07
Idaho	PUR1920E	321	6 00
Illinois	PUR1915D	646	5 00
Illinois	PUR1916B	318	7 00
Illinois	PUR1916D	781	6 58
Illinois	PUR1917A	658	6 00
Illinois	PUR1917B	368	6 00
Illinois	PUR1918B	172	5 50
Illinois	PUR1918E	74	5 50
Illinois	PUR1915E	23	5 00
Indiana	PUR1917F	209	4 50
Indiana	PUR1918C	489	5 00
Indiana	PUR1918E	859	5 00
Indiana	PUR1918E	669	5 00
Indiana	PUR1920C	209	5 00
Indiana	PUR1920C	854	5 00
Indiana	PUR1919E	504	5 00
Indiana	PUR1920A	422	5 00
Indiana	PUR1920B	813	5 00
Indiana	PUR1920D	83	5 00
Indiana	PUR1922E	46	5 00
Kansas	PUR1915B	507	6 00
Kansas	PUR1918C	55	6 50
Kansas	PUR1918C	777	5 72
Kansas	PUR1922A	321	4 36
Louisiana	PUR1922E	86	5 00
Maine	PUR1920C	386	3 32
Maryland	PUR1916C	925	6 25
[fol. 111] Michigan	PUR1921C	545	5 00
Michigan	PUR1921E	308	5 00
Michigan	PUR1923A	30	4 00
Minnesota	PUR1916C	141	8 94
Minnesota	PUR1921C	733	4 50
Missouri	PUR1915C	366	6 50
Missouri	PUR1920E	59	7 00
Missouri	PUR1919A	659	5 50
Missouri	PUR1922A	773	6 00
Nebraska	PUR1915E	57	6 00
Nebraska	PUR1919A	35	6 00
New Hampshire	PUR1918F	592	7 00

Jurisdiction	Citation		Rate fixed
New York	PUR1916B	940	5 80
New York	PUR1920D	529	5 66
North Dakota	PUR1921E	567	6 00
North Dakota	PUR1922E	602	5 00
Ohio	PUR1922A	155	5 00
Oregon	PUR1915F	290	2 39
Oregon	PUR1919D	345	3 55
South Dakota	PUR1915A	562	7 00
South Dakota	PUR1915B	223	7 00
South Dakota	PUR1915E	516	6 00
South Dakota	PUR1916A	364	7 00
South Dakota	PUR1916D	603	6 00
South Dakota	PUR1919B	734	7 00
South Dakota	PUR1922D	769	4 00
Utah	PUR1918C	566	6 50
Virginia	PUR1922A	756	5 50
West Virginia	PUR1921B	97	6 10
Wisconsin	2WRCR	105	3 67
Wisconsin	2WRCR	358	8 00
Wisconsin	2WRCR	427	10 00
Wisconsin	2WRCR	546	7 00
Wisconsin	3WRCR	117	8 00
Wisconsin	3WRCR	412	8 00
Wisconsin	3WRCR	452	8 00
Wisconsin	4WRCR	1	8 00
Wisconsin	4WRCR	259	7 50
Wisconsin	4WRCR	370	7 00
Wisconsin	4WRCR	407	7 00
Wisconsin	4WRCR	414	7 00
Wisconsin	6WRCR	211	8 00
[fol. 112] Wisconsin	6WRCR	419	6 50
Wisconsin	6WRCR	549	6 50
Wisconsin	6WRCR	573	6 50
Wisconsin	7WRCR	428	7 00
Wisconsin	7WRCR	698	7 00
Wisconsin	8WRCR	92	6 50
Wisconsin	9WRCR	383	6 50
Wisconsin	9WRCR	489	6 67
Wisconsin	11WRCR	180	6 50
Wisconsin	11WRCR	402	7 00
Wisconsin	11WRCR	429	6 50
Wisconsin	11WRCR	666	6 52

Jurisdiction	Citation		Rate fixed
Wisconsin	13WRCR	540	6 50
Wisconsin	14WRCR	157	7 00
Wisconsin	14WRCR	594	6 50
Wisconsin	15WRCR	182	9 00
Wisconsin	15WRCR	552	7 00
Wisconsin	16WRCR	402	6 67
Wisconsin	16WRCR	473	6 50
Wisconsin	16WRCR	758	7 00
Wisconsin	PUR1916C	1020	5 00
Wisconsin	PUR1916D	631	6 50
Wisconsin	PUR1917A	439	5 17
Wisconsin	PUR1917C	507	5 50
Wisconsin	PUR1917E	540	6 00
Wisconsin	PUR1919D	909	6 00
Wisconsin	PUR1920C	1019	6 00
Wisconsin	PUR1921E	171	4 58
Wisconsin	PUR1922A	164	6 00
Wisconsin	PUR1922B	91	5 00
Wisconsin	PUR1919F	92	5 21
Wisconsin	PUR1922B	553	3 50
Wisconsin	PUR1922D	368	5 00

The following court decisions also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.

Railroad Company v. Richmond, 96 U. S. 521.

[fol. 113] Munn v. Illinois, 94 U. S. 133.

Cumberland Telephone and Telegraph Company v. Louisville, 187 Federal 637.

Cumberland Telephone and Telegraph Company v. Memphis, 183 Federal 875.

Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.

Home Telephone and Telegraph Company v. Carthage, 139 S. W. 547.

Bell Telephone Company v. Houston, Texas, P. U. R. 1922D, 793.

6. Licensee Revenue Debtor (4% Contract).—This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Com-

pany and the Home Telephone and Telegraph Company of Spokane, whereby the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely: 1st, Subscribers' Station Revenues; 2nd, Public Pay Station Revenues; 3rd, Private Exchange Line Revenues, and 4th, Message Toll Revenues, less Uncollectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the American Telephone and Telegraph Company supplies at all times to the Pacific Com- [fol. 114] pany and the Home Company certain instrumentalities, services, etc. These instrumentalities and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standardized, new and improved apparatus and methods developed through research and experimental work by the American Company.

4. A guarantee of freedom from royalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted.

6. Advice and assistance in general engineering, plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

[fol. 115] 7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plan

for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters and Induction Coils.—It is conceded in this case, by all parties, that, should the only service performed by the American Company be the so called instrument service, the annual charges therefor which might properly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four and one half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under the contract. It is our opinion that the value [fol. 116] of the services rendered by the American Company exceeds the amount paid therefor, and we, accordingly, allow the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that four and one-half per cent of the revenues derived from increased rates is also fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end

and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and import-
[fol. 117] ance of the exchange increases or grows. Therefor, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage system of computing compensation. Eleven states, although they have allowed the full amount, have not approved the percentage method.

[fol. 118] The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the home office of the American Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before the Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al v. Pacific Telephone and Telegraph Company and the Postmaster General, and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a beneficial arrangement conducive to telephone development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

And again in that same order, we find the following:

"Between the Bell system and its constituent companies there has for many years existed what is known as the [fol. 119] four and one half per cent (4½%) contract. This contract is recognized and made a part of the agreement between the Bell System and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company, and Southwestern Bell Telephone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under [fol. 120] the circumstances disclosed in the evidence, the

fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four and one-half per cent contract is discussed in detail, and approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent company"—(The respondent company was in the position of the Pacific and Home companies here)—"the entire telephone experience of the world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the Ameri- [fol. 121] can Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.

"The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could not be obtained any other way except in a central organization. It would be impossible to render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient

and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented them to the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenues.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible from revenue in computing a rate of return.

[fol. 122] 8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting Item 7 from Item 1.

9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account. It is added to Item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

10. Adjusted Operating Income.—This item is merely the sum of Items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from the rate base figure in Finding 1. The amounts stated herein are average figures for the period and do not represent the rate base as of any specific date.

12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating Income by the Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

[fol. 123]

III

Hotel Rates

Finding:

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for the service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding:

The charges for toll messages now made by the respondent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications:

1. The classes of service at present being given to be continued.

2. The distances or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and regulations, shall be similar to the present tariff now in effect with the following exceptions:

[fol. 124] a. The initial period for all station to station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one third of the initial rate.

b. The initial period for all person to person, messenger and appointment intrastate messages shall be two minutes and the charge for each additional minute or fraction thereof shall be one half of the initial rate.

c. If the initial rate for station to station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person to person, messenger or appointment calls is not evenly divisible by two, the charge for each additional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion:

As stated in our order suspending the company's proposed rates we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

a. From facts thus far developed the Department is inclined to the view that property used and useful devoted [fol. 125] to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

The changes above directed in the toll schedule will accomplish the result contemplated by the Department in its suspension order.

V

Exchange Rates

Finding:

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, un- [fol. 126] fair, unreasonable and more than sufficient. The

exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair, reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the estimated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

Rates—Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional message exchange
	Wall set	Desk set		
Individual Line	$8.50	$8.75	120	$ .05
Extension (with or without bell)	.75	1.00		

[fol. 127] Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .30	$*	$ .05

* 25¢ per month additional

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two party Line	3.50	3.75
Four party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten party Service	3.00	3.25

Rates—Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	....	....

Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two party Line	2.75	3.00
Four party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban Ten party Service	3.00	3.25

[fol. 128] Rates—Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten party Line	3.50	3.75

* 25¢ per month additional

Business—Measured Service

	Rate per month		Free exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5 50	$5 75	110	$ 05
Extension (with or without bell)	75	1 00		

Semi-Public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ 20	$*	$ 05

* 25c per month additional

	Wall set	Desk set
Extension (with or without bell) per month	$1 00	$1 25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3 75	$4 00
Two-party Line	3 00	3 25
Four-party Line	2 50	2 75
Extension (with or without bell)	75	1 00
Suburban—Ten party service	3 00	3 25

Hotel Private Branch Exchange Service Rates, Seattle, Tacoma, and Spokane Exchanges

Unlimited Service

Switchboard or Order Board, with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3 00
Non-Multiple Cord Type:	
10 lines or less in use	5 00
11- 30 lines in use	6 00
31- 60 lines in use	7 00
61-100 lines in use	8 00
101-150 lines in use	9 00
151-200 lines in use	10 00
201-260 lines in use	11 00
261-320 lines in use	13 00
[fol. 129] Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15 00
Each additional strip of ten multiple jacks or portion thereof	30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with that Board

	Seattle	Tacoma	Spokane
Each station not in guest room, without dial—			
Wall Set	$1 25	$0 95	$1 00
Desk Set	1 50	1 20	1 25
Each station not in guest room, with dial—			
Wall Set	1 50	1 15	1 20
Desk Set	1 75	1 40	1 45
Each station in guest room, without dial—			
Wall Set	75	55	60
Desk Set	1 00	80	85
Each station in guest room, with dial—			
Wall Set	1 00	75	80
Desk Set	1 25	1 00	1 05

Stations outside premises in which switchboard or order board is located—See Mileage Rates—Section 3.

Trunk lines to central office from switchboards or order boards. Each bothway trunk line—Individual Line business rate plus $3.00. Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 130] Statement of Operating Income and Rate of Return Estimate for the year 1923

	Present rates	Company proposed rates	Department allowed rates
1. Operating Revenues	$9,300,441 00	$11,474,615 00	$10,751,350 00
Deduction from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889 00	5,603,889 00	5,603,889 00
3. Taxes Assignable to Operations	581,000 00	658,057 00	637,413 00
4. Uncollectible Revenues	35,618 00	48,367 00	44,445 00
5. Depreciation (on Depreciable Property)	1,674,024 00	1,674,024 00	1,674,024 00
6. Licensee Revenue—Dr	386,170 00	386,170 00	386,170 00
7. Total Deductions from Revenues	$8,280,701 00	$8,370,507 00	$8,345,941 00
8. Operating Income	$1,019,740 00	$3,104,108 00	$2,405,409 00
9. Interest during Construction	148,122 00	148,122 00	148,122 00
10. Adjusted Operating Income	$1,167,862 00	$3,252,230 00	$2,553,531 00
11. Rate Base (incl. Const. Work in Progress)	$34,789,635 00	$34,789,635 00	$34,789,635 00
12. Rate of Return	3 36%	9 35%	7 34%

[fol. 131] Farmer Line Rates

Finding No. VI:

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standardize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the number of exchange station is—	The annual farmer line rate shall be
Over 20,000	$15 00
10,000 to 20,000	11 00
5,000 to 10,000	8 00
3,000 to 5,000	6 00
2,000 to 3,000	5 00
1,000 to 2,000	4 00
500 to 1,000	3 50
Under 500	3 00

Reparation

Finding No. VII:

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

[fol. 132] Discussion:

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegraph Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

[fol. 133] In view of the foregoing statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue, the same is hereby dismissed.

Order

It is hereby ordered:

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with the findings of fact and directions herein contained; and [fol. 134] that all rates, rules and regulations as amended

or supplemented as herein found and ordered be, and they are hereby made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness the Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, by ——— ———, Director. Hance H. Cleland, Supervisor of Public Utilities. ———, Supervisor of Transportation.

Attest: ——— ———, Secretary.

[fol. 135] EXHIBIT "F"

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Washington, Set Out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities, State of Washington in Case Numbers 902 and 5344

Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Two-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Five each message per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$3.50	$3.75	150	$ .05
Extension (with or without bell)	.75	1.00		

Semi-Public Coin Box Service

	Rate per day		Each Exchange message
	Wall set	Desk set	
Individual Line	$ .20	*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

*25¢ per month additional.

[fol. 136] Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two party Line	3.00	3.25
Four party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten party service	3.00	3.25

Hotel Private Branch Exchange Service Rates Spokane Exchange—Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3 00

Non Multiple Cord Type:

10 lines or less in use	5 00
11- 30 lines in use	6 00
31- 60 lines in use	7 00
61-100 lines in use	8 00
101-150 lines in use	9 00
151-200 lines in use	10 00
201-260 lines in use	11 00
261-320 lines in use	13 00

Multiple Cord Type:

Each position with not to exceed one multiple jack per line	15 00
Each additional strip of ten multiple jacks or portion thereof	30

Stations on premises in which switchboard or order board is located and connected with that board.

	Spokane
Each station not in guest room, without dial—	
Wall Set	$1 00
Desk Set	1 25
[fol. 137] Each station not in guest room, with dial—	
Wall Set	1 20
Desk Set	1 45

	Spokane
Each station in guest room, without dial—	
Wall Set	60
Desk Set	85
Each station in guest room, with dial—	
Wall Set	80
Desk Set	1 05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk Lines to central office from switchboard or order boards—

Each bothway trunk line—Individual Line business rate plus $3 00

Each incoming trunk line—Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[File endorsement omitted.]

[fol. 138] In United States District Court

[Title omitted]

Answer to Amended and Supplemental Complaint—Filed May 28, 1925

This, the joint answer of John C. Denney, as Director of Public Works of Washington, O. C. Calderhead, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, to the amended and supplemental complaint herein, shows:

I

They admit the allegations of paragraphs one, two and three thereof.

II

These defendants admit the allegations of paragraph four of the amended and supplemental bill of complaint, except that these defendants deny that the order of the Department of Public Works therein referred to is confiscatory of plaintiff's property, or that they seek, or that any of them seeks, to deprive plaintiff of its property without due process of law, or to deny to plaintiff the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

[fol. 139] III

These defendants admit the allegations of paragraphs five, six, seven and eight of the amended and supplemental bill of complaint.

IV

As to the allegations of paragraph nine of the amended and supplemental bill of complaint, these defendants on information and belief, deny that the cost to plaintiff of its property in the Spokane exchange (land being included at present value) and used or useful in furnishing intrastate and interstate telephone service to the public therein, and exclusively devoted to the rendition of said service was, as of June 30, 1922, the sum of $4,056,215 or in any sum in excess of the sum of $3,500,000. They admit that the sum of $4,056,215 is substantially the rate base fixed for the plaintiff as of June 30, 1922, by the Department of Public Works in its said order of March 31, 1923.

V

As to the allegations of paragraph ten of the amended and supplemental bill of complaint, these defendants, on information and belief, deny that the cost to plaintiff of its property in the Spokane Exchange (land being included at present value) and used or useful in furnishing intra-

state telephone service to the public therein and exclusively devoted to the rendition of that service was, as of December 31, 1922, the sum of $4,073,399, or any sum in excess of $3,000,000. They deny that the cost of reproduction of said property as it existed on December 31, 1922, was the sum of $7,793,411, or any sum in excess of $4,000,000. They deny that the cost of reproduction of said property less depreciation was, as of December 31, 1922, the sum of $7,145,314, or any sum in excess of $3,500,000. They deny that the fair and reasonable value of said property, was, as of December 31, 1922, the sum of $5,497,049, or any sum in excess of $3,500,000.

[fol. 140] They admit that none of the statements contained in paragraph 10 of the amended and supplemental bill of complaint as to the cost to plaintiff of said property includes nothing on account of the item of franchise or the item known as "going concern" value, and they deny that there has been any cost to or value to plaintiff on account of said items or either of them.

They have no knowledge or information sufficient to form a belief as to whether the item of "going concern" value was considered by plaintiff in calculating the cost of reproduction or estimating the fair and reasonable value of said property.

VI

As to the allegations of paragraph 11 of said amended and supplemental bill of complaint, they deny that plaintiff is entitled to earn the sum of at least eight per cent per annum on the fair and reasonable value of its property used or useful in the rendition of service to the public covered by the rates in question, and they deny that plaintiff is entitled to earn on said value any rate in excess of six per cent per annum.

VII

As to the allegations in paragraph 12 of said amended and supplemental bill of complaint, these defendants, on information and belief, deny that plaintiff's telephone business in the Spokane exchange has been conducted efficiently and economically during any of the times therein referred

to. These defendants allege that plaintiff's net earnings referred to in said paragraph are matters of conclusion from facts, rather than matters of fact capable of exact statement, and said defendants, on information and belief, deny that plaintiff's net earnings on the cost and fair value of its property in the Spokane exchange are the sums respectively set forth in said paragraph, but, on the contrary, they allege, on information and belief, that said net returns, [fol. 141] properly computed, are much larger than as stated in plaintiff's amended and supplemental bill of complaint, and will and do amount to the sum of $500,000 per annum. These defendants, on information and belief, deny that the fair and reasonable value of plaintiff's property, used and useful in public service in the Spokane exchange, is substantially or any in excess of its cost.

VIII

As to the allegations of paragraph 13 of said amended and supplemental bill of complaint, these defendants, on information and belief, deny that during the years 1919, 1920, 1921 and 1922, plaintiff's rates were not compensatory, or were less than just and reasonable rates, but, on the contrary, said defendants, on information and belief, allege that said rates for said period were compensatory, just and reasonable. These defendants, on information and belief, deny that the amounts by which the net revenue derived by the plaintiff from its telephone and telegraph business in the Spokane exchange were less than eight per cent. of the cost of the property or useful in each case and exclusively devoted to the rendition of service within said state and for said exchange in the amounts set forth in said paragraph 13 of the amended and supplemental bill of complaint, but, on the contrary, they, on information and belief, allege that the net returns of plaintiff, properly computed, on its said properties do not differ in any respect from a fair and reasonable return.

IX

They admit the allegations of paragraphs 14 to 17, inclusive, of said amended and supplemental bill of complaint.

X

As to the allegations of paragraph 18 of said amended and supplemental bill of complaint, they deny that the cost to plaintiff of its property in the Spokane exchange (land being included at present value) and used or useful in furnishing its intrastate telephone service to the public therein and exclusively devoted to the rendition of that service was, [fol. 142] as of the thirty first day of December, 1923, the sum of $4,204,898 or any sum in excess of the sum of $3,000,000; and they deny that the value of said property, as of July 31, 1924, was the sum of $4,517,382, or any sum in excess of $3,000,000. They deny that the fair and reasonable value of said property was, as of the thirty first day of December, 1923, the sum of $5,628,549, or any sum in excess of $3,500,000. They deny that the fair and reasonable value of said property, as of July 31, 1924, was the sum of $5,941,033, or any sum in excess of $3,500,000.

They admit that plaintiff's statement as to the cost of said property, at the dates in said paragraph mentioned, includes nothing on account of the item of franchise and the item of "going concern" value, and they deny that there was any cost to plaintiff on account of either of said items, they having no knowledge or information sufficient to form a belief as to whether plaintiff, in alleging the fair and reasonable value of its property, included anything for the item known as "going concern" value, and allege affirmatively that no money was expended by plaintiff therefor.

XI

As to the allegations of paragraph 19 thereof, they deny that from January 1, 1923 to August 1, 1924, plaintiff practiced reasonable economy consistent with adequate and efficient service to the public. They deny that its net earnings derived from intrastate telephone business, as stated in said paragraph, was the amount there stated, and allege affirmatively that upon a proper valuation of its property and a proper computation of its earnings, it earned during said period, on both its cost and fair value, at least eight per cent. per annum.

They deny that the net revenues derived by plaintiff from its intrastate telephone business in the Spokane exchange, during the period from January 1, 1923 to August 1, 1924, were less than eight per cent. on its cost or fair value, and they allege affirmatively that during the said [fol. 143] period of time they earned at least eight per cent. on its cost and upon its fair value under a proper computation of its earnings.

XII

As to the allegations of paragraph 20 of said amended and supplemental bill of complaint, they deny that the cost to plaintiff of its property in the Spokane (land being included at its present value) and used or useful in furnishing its intrastate telephone service to the public, was, as of the thirty first day of December, 1924, the sum of $4,624,812, or any sum in excess of $3,000,000. They have no knowledge or information sufficient to form a belief as to whether since December 31, 1924, any sum has been expended on account of additions to betterments made to said property. They deny that the fair and reasonable value of said property of plaintiff was, as of the thirty first day of December, 1924, the sum of $6,048,462, or any sum in excess of the sum of $3,500,000.

They admit that the statement in said paragraph contained as to the cost to plaintiff of said property includes nothing on account of the item of franchise or "going concern" value, and they deny that plaintiff incurred any cost on account of either the said items. They have no knowledge or information sufficient to form a belief as to whether in determining the fair and reasonable value of said property in said paragraph, plaintiff has included anything for "going concern" value, and they deny that any amounts have been expended by plaintiff on account of said items.

XIII

As to paragraph 21 thereof, they deny that plaintiff, from July 31, 1924, to December 31, 1924, practiced all reasonable economies consistent with adequate and efficient service to the public. They deny that during the said period

of time plaintiff's net earnings upon said property on the cost thereof were 6.44% per annum and on fair value 4.92% per annum.

And they allege affirmatively that during said period the plaintiff's net earnings upon the cost and the fair value [fol. 144] of said property were in excess of eight per cent per annum. They deny that the net revenues from plaintiff's intrastate business during said period were less than eight per cent. on the cost and fair value of the property during said period in the sums therein set forth or in any whatsoever.

XIV

As to the allegations of paragraph 22 thereof, they deny that the rates and charges collected by plaintiff from August 1, 1924, to December 31, 1924, are less than the just and reasonable rates and charges to which plaintiff is lawfully entitled, and allege affirmatively that said rates and charges are much in excess of the rates and charges to which plaintiff is lawfully entitled.

XV

As to the allegations of paragraph 23 of said amended and supplemental bill of complaint, defendants deny that unless they are restrained and enjoined herein, the plaintiff, or anyone in its behalf, by any attempt of these defendants to compel a compliance with that certain order of March 31, 1923, or to enforce penalties or otherwise, will be forced to submit to confiscation of plaintiff's property without due process of law and in violation of plaintiff's rights under the Constitution of the United States, and will be subject to great and irreparable loss or damage, or any loss or damage, and they deny that plaintiff has no speedy or adequate remedy at law.

And for a further, separate and affirmative answer and defense to said amended and Supplemental Bill of Complaint, these defendants allege and say:

1. Heretofore, to wit, on the eleventh day of August, 1905, pursuant to the provisions of law and the Charter of the City of Spokane, Washington, an election was duly held in

said city wherein and whereby a franchise was granted to the plaintiff herein for the operation of a telephone sys- [fol. 145] tem within the limits of the City of Spokane; that said franchise so granted is evidenced by Ordinance No. A2118 of the City of Spokane, Washington, entitled:

"An ordinance granting to the Home Telephone & Telegraph Company of Spokane the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through man holes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables, by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor."

And that thereafter said ordinance was amended by Ordinance No. A4079 of said City of Spokane, passed by the City Council April 13, 1909, and approved by the Mayor thereof April 4, 1909, and entitled:

"An ordinance amending section 13 of Ordinance No. A2118, entitled 'An ordinance No. A2118, granting to The Home Telephone and Telegraph Company of Spokane the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor.'"

That a true and correct copy of said Ordinance No. A2118 is filed herewith, attached hereto, marked Exhibit "A" and hereby specially referred to and made a part hereof.

That a true and correct copy of said Ordinance No. A4079 is filed herewith, attached hereto, marked Exhibit "B" and hereby specially referred to and made a part hereof.

2. That the terms and conditions of said ordinances were duly accepted by the plaintiff herein, and that ever since said acceptance the plaintiff herein has been, and now is, the owner of said franchise and has been, and now is, operating thereunder, save as hereinafter set forth.

3. That it has been adjudicated by the Supreme Court of the State of Washington in that certain judgment and [fol. 146] opinion rendered in the case of the State of Washington on the relation of Harvig Ellertsen, respondent, versus The Home Telephone and Telegraph Company of Spokane, appellant, 102 Wash. 196, that said franchise constitutes a valid contract between the plaintiff herein on the one hand and the City of Spokane and each of its citizens on the other hand, save as it might be modified by the Department of Public Works of the State of Washington or by its predecessor in office, the Public Service Commission of the State of Washington.

4. That no order in relation to the said contract has ever been made by the Public Service Commission of Washington or the Department of Public Works of the State of Washington, save that on the twentieth day of March, 1919, the Public Service Commission of Washington attempted to make an order by consent of the plaintiff herein and the City of Spokane, Washington, which order permitted the putting into effect of the rates set forth in Exhibit "A" attached to the amended and supplemental bill of complaint herein, and in which order the following language was used:

"It is further ordered that all contracts in conflict with the rates provided for in Postmaster General's Tariff W. P. S. C. No. 2, as modified, of the Home Telephone and Telegraph Company of Spokane be terminated.

"It is further ordered that the effective date of said Tariff as modified shall be April 1, 1919."

5. That the said attempted order was, and is, a nullity in that the property of the Home Telephone and Telegraph Company was then in the exclusive possession and control of the President of the United States by virtue of the laws of the United States, and the Public Service Commission of Washington was without jurisdiction to make any order relating to the rates of the plaintiff herein.

Wherefore, these defendants having fully answered all the matters in the amended and supplemental bill of com- [fol. 147] plaint herein material to be answered according to their best knowledge and belief, humbly pray this Honorable Court that the said defendants be hence dismissed with their reasonable costs and charges, and said defendants humbly pray for such other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

Department of Public Works of Washington, by John C. Denney, Director of Public Works. O. O. Calderhead, Supervisor of Public Utilities. Frank R. Spinning, Supervisor of Transportation. John H. Dunbar, Attorney General. Attest: C. E. Van Etten, Secretary. (Seal.) John H. Dunbar, Attorney General; H. C. Brodie, Assistant Attorney General, Solicitors for Defendants. J. M. Geraghty, Alex M. Winston, of Counsel.

[fol. 148] EXHIBIT "A" TO ANSWER

Ordinance No. A2118

An Ordinance granting to the Home Telephone & Telegraph Company of Spokane, the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables, by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor.

The City of Spokane does ordain, as follows:

Section 1. That the Home Telephone & Telegraph Company of Spokane, be and it is hereby granted the right, privileges and franchise to erect poles, with the necessary supports, crossarms and fixtures, and string wires and cables thereon, and to construct underground conduits, and to lay, place and stretch wires and cables therein, along, over, upon, under and across the streets, alleys, avenues and public places of the City of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip and install, maintain and operate a telephone and telegraph system and to conduct a general telephone and telegraph business within the said City of Spokane.

Section 2. Said grantee shall construct the underground system, under the supervision and direction of the board of public works of the said City of Spokane or such other board or official of the said City of Spokane as may be lawfully designated.

The grantee shall place, lay, maintain and operate its [fol. 149] cables in underground conduits and pipes within

the district bounded and described as follows, to-wit: Commencing at a point where the Northerly line of First Avenue intersects the easterly line of Monroe Street, in said City of Spokane, thence along the easterly line of Monroe Street to the point where the said easterly line of Monroe Street intersects the southerly line of Main Avenue, thence along the southerly line of Main Avenue to a point where the southerly line of Main Avenue intersects the easterly line of Lincoln Street, thence along the easterly line of Lincoln street to the point where the easterly line of Lincoln Street intersects the southerly line of Front Avenue, thence along the Southerly line of Front Avenue to a point where the southerly line of Front Avenue intersects the westerly line of Bernard Street, thence along the westerly line of Bernard Street to the point where the westerly line of Bernard Street intersects the Northerly line of First Avenue, thence along the northerly line of First Avenue to the point where the said northerly line of First Avenue intersects the easterly line of Monroe Street.

All necessary connections to subscribers' stations and to other points may be made from such cables sith such means, apparatus, poles, wires and appliances as may be requisite. Said grantee shall, if required by the council, file with the Board of Public Works of said city, plans of all conduits, manholes, distributing poles and all other constructions proposed within the limits of the streets, alleys, highways and public places of the said city, in such form and detail as may be required, and approved in writing. During the entire work of construction authorized by this franchise an inspector may be appointed by the Board of Public Works to see that all the terms and conditions of this franchise are strictly conformed to. All poles erected hereafter by virtue of this franchise and grant shall conform in length and the wires thereon shall conform in height to the reasonable rules and regulations adopted by said Board of Public [fol. 150] Works. Provided, that nothing in this section contained shall be construed as prohibiting the City of Spokane or the Council thereof from, at any time hereafter, exercising its police power to require the main line wires of the grantee to be placed in conduits in any other section of said City, provided that such police power shall not be exercised except by ordinance, applicable alike to all telephone, telegraph and electric light wires and poles, and pro-

vided further, that in the residence portion of said city all poles shall, so far as practicable, be set in alleys, where such alleys exist.

Section 3. That traps or manholes may be constructed along the line of said conduit for the purpose of affording access thereto, provided that said traps or manholes be located or constructed in conformity with the instructions and to the satisfaction of the Board of Public Works of said City; said traps or manholes shall be so capped or covered as to be flush with the surface of the street and not to interfere in any way with the use of said streets for travel or traffic.

Section 4. The said grantee may, under the direction of the Board of Public Works, or such other board or official of the City of Spokane as may be lawfully designated, make all necessary excavations in any of the said streets, alleys or public places for the purpose of erecting and maintaining poles and other supports for its wires or conductors and for repairing the same, and for the purpose of laying, repairing and maintaining said underground pipes and conduits and said manholes, and for placing, repairing, maintaining and operating said wires and conductors therein. All poles that are erected and maintained pursuant to the terms of this ordinance shall be erected at the edge of the sidewalks unless otherwise directed by the Board of Public Works or such other board or official as the Council or law may designate, in a good and substantial manner. When any excavating shall have been made pursuant to the authority hereby granted, the grantee shall restore the portion of the street, alley or public highway excavated to the same good order and condition to which it was prior to said work, and all said work shall be done in compliance with [fol. 151] the reasonable and necessary rules, regulations ordinances or orders which may during the continuance of this franchise be adopted from time to time by the said Council, or provided by law, and said work of repairing said streets, alleys and public highways shall be done to the satisfaction of the said common council, or such official or officials as the law may designate.

Section 5. Nothing in this ordinance shall be construed as in any wise to prevent the proper authorities of the *of the*

said City from sewering, grading, paving, planking, repairing, altering or doing any work that may be desirable on any of the streets, alleys or public highways of said City, but all such work shall be done, if possible, in such a manner as not to obstruct, injure or prevent the free use and operation of the said telephone and telegraph system of said grantee.

Section 6. The grantee, whenever or wherever electric currents are used or employed in or about the use of the franchise by this ordinance granted, or the ground connected therewith, shall provide and put in use such means and appliances as will control and effectually contain such currents in their proper channels on its own wires, so as to prevent injury to the property, pipes and other structures belonging to the City of Spokane or any other person, firm or corporation within said City, and shall repair and renew said means and appliances and from time to time change and improve the same as may be necessary to accomplish said purposes, all at its own charge or expense, and at its risk, selecting and adopting such means and appliances as shall prevent injury to the property, pipes or other structures belonging to the City of Spokane, or any person, firm or corporation.

Section 7. Whenever it shall be necessary in grading any street or alley of said city or in building any sidewalk or making any other improvements thereon, to remove any pole or poles belonding to said grantee, on which any line or lines, wire or wires belonging to grantee shall be [fol. 152] stretched or fastened, the said grantee shall, upon receipt of twenty four hours' notice from the Board of Public Works or such other board or official as the Council or law may designate, remove such pole or poles, and if said grantee, upon such notice, shall neglect or refuse to remove such pole or poles, then such pole or poles shall be removed by the Board of Public Works or such other board or official as the Council or law may designate, at the expense of said grantee.

Section 8. Whenever any person or company shall have obtained permission of the properly constituted authorities of the City of Spokane to remove any building through

any street or streets, the grantee, if it has a line on said streets, on due notice from such person or company, shall raise, remove or adjust its lines so as to allow an unobstructed passage of such building; and if said grantee shall, after said notice, neglect to do so, the properly constituted authority of the City of Spokane shall, at the expense of said grantee, remove said lines as far as they are an obstruction to the passage of said building.

Section 9. For the purpose of effectually securing efficient service and for the purpose of the continued maintenance of the property, plant, system and exchange constructed and operated under this franchise, the grantee shall keep and maintain its poles, conduits, plant, system and exchange in good order and repair, and shall render efficient service throughout the entire term of this grant. If the grantee shall fail at any time to keep in good repair the poles, conduits, wires, plant, system and exchange constructed, operated and maintained under this franchise, or shall fail during the period of this franchise to render efficient service, the Council of said city, may declare this grant and all the rights and privileges herein conferred forfeited, and, upon adjudication of forfeiture by a court of competent jurisdiction, this franchise and all the rights and privileges conferred thereby shall become null and void, but no decree of forfeiture hereof shall be made if [fol. 153] before the rendition of such decree adjudicating such forfeiture the said grantee shall place said plant, system, exchange and property in good order and repair and shall render efficient service thereby and thereafter.

Section 10. That said grantee shall not, without the consent of the City, evidenced by ordinance, sell or transfer the conduits, poles, wires or appliances of any kind or description, or sell, lease, assign or transfer any of the rights or privileges herein authorized or granted to any person, company, trust or corporation now or hereafter engaged in the telephone and telegraph business, and shall not at any time enter into any combination directly or indirectly, with any person or persons, or any corporation concerning the rate to be charged for telephone or telegraph service, nor with any officer or officers, employes or manager of any telephone or telegraph system constructed or being operated in said city.

Section 11. That all telephone lines constructed or operated under said franchise shall have complete copper metallic circuits, and that the conduit system constructed and laid down under this franchise shall be of such size and capacity as to accommodate wires, cables or conductors sufficient to provide for ten thousand (10,000) telephones.

That the rent or charge for an unlimited, independent metallic circuit telephone service in the system established or maintained under this franchise, so long as such system does not connect an exchange with more than four thousand (4,000) telephones, shall not exceed four and twenty-five one hundredths dollars ($4.25) per month; and said charge, so long as such system does not connect an exchange with more than ten thousand telephones, shall not exceed six and twenty-five one hundredths dollars ($6.25) per month; and in no event shall said rent or charge exceed eight and twenty-five one hundredths dollars ($8.25) per month for a telephone installed in any business office or premises for business purposes; and shall not exceed two and twenty-five one hundredths dollars ($2.25) per month [fol. 154] for a telephone installed in a private residence; provided that a discount of twenty-five cents per month shall be made for cash payment on or before the tenth day of the month in which the service is rendered.

Section 12. The said grantee, in consideration of the franchise rights and privileges granted by this ordinance, and as compensation therefor, shall, within thirty days from the commencement of the operation of the said telephone exchange, furnish to the City of Spokane, twenty-five (25) telephones and connect the same with the telephone system of said grantee, and thereafter maintain and keep the same in good repair and working order during the term of said franchise, without expense or charge to said City of Spokane, and shall allow the City of Spokane the free and exclusive use of the upper cross arm on each of the poles erected or maintained under this franchise during the whole term thereof, and as further compensation, said grantee shall pay to the City of Spokane the sum of ninety thousand dollars ($90,000.) as follows, to-wit:

Three thousand dollars ($3,000) on the 1st day of January, 1911, and three thousand dollars ($3,000) on the 1st

day ow January of each and every year thereafter during the life of this franchise, and said franchise may be forfeited by a failure to make the payments herein provided for.

Section 13. The work of constructing said telephone plant, system and exchange to be constructed, maintained and operated under the provisions of the franchise herein granted shall be commenced in good faith within not more than eight months from the date of the acceptance of said franchise, and shall be continuously prosecuted thereunder in good faith, and shall be completed within not more than three years thereafter. That the said grantee shall, in good faith, lay out and expend for material and labor used and performed in the construction of said telephone plant, system and exchange, including office and exchange buildings, poles, conduits, manholes, wires, cables, switchboards, telephonic apparatus and appliances the following sums within [fol. 155] the period hereinafter mentioned, respectively: Fifty thousand dollars ($50,000) within one year after the grant of the franchise herein provided for is passed, approved and becomes effective; one hundred and fifty thousand dollars ($150,000) within two years after the grant of the franchise herein provided for is passed, approved and becomes effective, and six hundred thousand dollars ($600,000) within three years after the grant of the franchise herein provided for is passed, approved and becomes effective.

Section 14. The Board of Public Works of the City of Spokane or other properly constituted authority thereof shall have the power and authority to inspect the manner of erecting said poles, constructing said conduits and stringing and laying said wires and carrying out the provisions of this ordinance.

Section 15. Said grantee hereby agrees and covenants to indemnify and save harmless the City of Spokane against all damages, costs and expenses whatsoever to which the said City may be subjected in consequence of the acts or neglects of grantee, its agents or servants in any manner arising from the rights and privileges granted herein.

Section 16. The rights, privileges and franchise hereby granted shall terminate at the expiration of thirty-five (35) years from the date this ordinance becomes of force and effect.

Section 17. That at any time after the expiration of ten (10) years from the date this franchise becomes effective, the City of Spokane reserves the right, at its election and upon the payment therefor of a fair valuation thereof, to be made and determined as hereinafter provided, to purchase as an entirety and take over to itself all of the property, plant, system and exchange constructed, operated and maintained under the rights conferred by this grant which may be situated on, in, above and under the streets, avenues and public places of the City of Spokane enumerated in Section 1 of this ordinance, together with all real personal and mixed property, apparatus, appliances, appurtenances of every kind and description, including [fol. 156] all choses in action, contracts, subscriptions and good will, making up, constituting and used in connection with such plant, system and exchange so operated and maintained under the rights and franchises herein granted.

In determining the valuation of said plant and property to be purchased and taken over by the city there shall be included in such valuation the value of all poles, crossarms, braces, wires, conduits, manholes, buildings, real estate, switchboards, telephones and all real, personal and mixed property, including all apparatus, appliances, appurtenances, contracts, choses in action and good will of every kind and description making up, constituting and used in connection with such plant, system, exchange and telephone and telegraph business. The price or valuation to be paid by the City of Spokane for said property, plant, system and exchange and telephone and telegraph business shall be fixed and determined by three arbitrators, one appointed by the Council of the City, another by the grantee, and the third appointed by the two so chosen, and the decision in writing of said three arbitrators, or a majority of them, made in duplicate and signed by them, one delivered to the Major of the City of Spokane and the other to the grantee, shall be final and binding upon the

parties, and said price and valuation shall be paid to the grantee hereinbefore said grantee shall be deprived of the possession or right to maintain, operate and enjoy said property, plant, system and exchange, and, upon payment by the City of said grantee of such price and valuation so determined as aforesaid, said plant and property so valued, purchased and paid for shall become the property of the City of Spokane by virtue thereof and payment therefor as aforesaid, and without the execution of any instrument of conveyance. Should said grantee neglect for a reasonable time after it has been determined that the City is authorized to and will purchase and take over said plant and property, and after notice to that effect from the City, to select an arbitrator, or in case the two arbitrators chosen [fol. 157] by the Council of the City and the grantee respectively neglect for a reasonable time after their appointment to select a third arbitrator, then, and in either of said cases, the Judges of the Supreme Court of the State of Washington shall appoint three arbitrators to determine the price or valuation to be paid for said plant and property, and the decision of said three arbitrators, or a majority of them, so chosen by the Judges of the Supreme Court, made in writing in duplicate and delivered to the parties, as aforesaid, shall be final and binding upon the parties.

Section 18. Within thirty (30) days after the passage of this ordinance the said grantee shall file with the Clerk of the City of Spokane a bond in the sum of ten thousand dollars ($10,000) with two sufficient sureties to be approved by the Mayor, conditioned:

First. That the grantee shall commence the work of constructing the plant, system and exchange to be constructed and operated under the provisions of this franchise in good faith within not more than eight months from the date of granting such franchise; and, that said work shall be prosecuted thereafter in good faith and shall be completed with a pole line and conduit ultimate capacity of not less than ten thousand (10,000) telephones, within not more than three years thereafter.

Second. That the grantee shall expend the sums of money, respectively, within the periods prescribed by Section 13 of this ordinance.

Third. That each and every street, alley or highway, or any portion thereof, that may be disturbed or torn up by said grantee under the provisions of this Ordinance shall be replaced and put in as good order and condition as the same was in before it was so disturbed or torn up, and be thereafter maintained for a period of one year.

Fourth. That the grantee shall pay all damages, costs [fol. 158] and expenses whatsoever to which the City may be subjected in consequence of the acts of negligence of grantee, its servants or agents, in any manner arising from the rights and privileges granted herein.

Fifth. That said grantee will faithfully keep and perform each and every term and condition imposed by this ordinance.

Section 19. That any neglect, failure or refusal to comply with any of the conditions of this franchise or grant may thereupon effect a forfeiture hereof, and the said City of Spokane may, by its Council, with the approval of the Mayor of said City, declare this grant and all the rights and privileges herein conferred forfeited, and upon adjudication of forfeiture by a court of competent jurisdiction, this franchise and all the privileges and rights conferred thereby shall become null and void.

Section 20. The said grantee shall, within thirty (30) days after this ordinance shall be passed and approved, file in the office of the City Clerk of the City a written acceptance of this ordinance and franchise herein granted, and the failure upon the part of the grantee herein to file such written acceptance within the time herein specified shall be deemed an abandonment and rejection of the franchise, rights and privileges herein conferred, and this ordinance shall be forever null and void, and such acceptance by grantee shall be unqualified and shall be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

Submitted to a vote of the people at an election held August 11th, 1905, pursuant to Amendment No. 61 of the Charter of the City of Spokane, Washington, and adopted by the following vote: For said ordinance, 2,447 votes; against said ordinance, 387 votes.

August 18th, 1905.

G. B. Koontz, President of the City Council.

Attest: C. A. Fleming, City Clerk.

[fol. 159] State of Washington,
County of Spokane,
City of Spokane, ss:

I, H. D. Dearling, City Clerk of the City of Spokane, Washington, do hereby certify that the foregoing is a true, accurate and correct copy of that certain Ordinance No. A2118, entitled:

"An Ordinance granting to the Home Telephone & Telegraph Company of Spokane the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables, by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor,"

passed by the City Council August 18, 1905, the original of which is now on file in and a part of the records of the said City Clerk.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of the said City of Spokane, Washington, this 21st day of May, A. D. 1925.

H. D. Dearling, City Clerk of the City of Spokane, Washington, by ——————, Deputy. (Seal of the city of Spokane, Washington.)

[fol. 160] EXHIBIT "B" TO ANSWER

Ordinance No. "4079"

An ordinance amending section 13 of Ordinance No. A2118, entitled "An Ordinance No. A2118, granting to the Home Telephone and Telegraph Company of Spokane, the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor."

The City of Spokane does ordain as follows:

Section 1. That section 13 of an Ordinance No. A2118 granting to the Home Telephone and Telegraph Company of Spokane, the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables, along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane, for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor, be amended to read as follows; viz:

Section 13. The work of constructing said telephone plant, system and exchange to be constructed, maintained and operated under the provisions of the franchise herein [fol. 161] granted, shall be completed by the 1st day of December, 1910.

Said grantee, by that date, shall lay out and expend in good faith, for material and labor used and performed in the construction of said telephone plant, system and exchange including office and exchange grounds and buildings, poles, conduits, manholes, wires, cables, switchboards, telephone apparatus and appliances, not less than six hundred thousand dollars ($600,000.00), said sum being inclusive of all moneys expended for said purpose from the commencement of said work until the completion thereof.

Passed the City Council April 13th, 1909.

E. Lambert, President of the City Council. C. Herbt. Moore, Mayor.

Attest: C. A. Fleming, City Clerk.
Approved: Apr. 14 09.

[fol. 162] State of Washington,
County of Spokane,
City of Spokane, ss:

I, H. D. Earling, City Clerk of the City of Spokane, Washington, do hereby certify that the foregoing is a true, accurate and correct copy of that certain Ordinance No. A4079, entitled:

"An Ordinance amending section 13 of Ordinance No. A2118, entitled "An ordinance, No. A2118), granting to the Home Telephone and Telegraph Company of Spokane, the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the City of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables by means of electricity, and to construct, establish, equip and install a telephone and telegraph business within the said City of Spokane, and fixing the compensation to be paid therefor,"

passed the City Council April 13, 1909, the original of which is now on file in and a part of the records of the said City Clerk.

In witness whereof, I have hereunto set my hand and affixed the official seal of the said City of Spokane, Washington, this 21st day of May, A. D. 1925.

H. D. Dearling, City Clerk of the City of Spokane, Washington, by ——— ———, Deputy. (Corporate Seal.)

[fols. 163-276] State of Washington,
County of Thurston, ss:

The undersigned being first duly sworn on oath deposes and says: that on May 23rd, 1925, at Olympia, Washington, he deposited in the United States Postoffice, in a sealed envelope addressed to "Mr. Otto B. Rupp, 660-671 Colman Building, Seattle, Washington, copy of the within and foregoing joint answer of defendants to amended and supplemental — in the within entitled action.

H. C. Brodie.

Subscribed and sworn to before me this 27th day of May, 1925. Chas. O. Flint, Notary Public in and for the State of Washington, Residing at Olympia. (Seal.)

[File endorsement omitted.]

[fol. 277] In United States District Court

Report of John F. Condon, Special Master — Filed September 17, 1925

Franchise Contract as to Rates

Findings of Facts

This question is presented by the "Affirmative Answer and Defense" of the Defendants in the Pacific Company Case #166 E, set forth at pages 19 to 36 of their printed answer; and by the "Affirmative Answer and Defense" of the defendants in the Home Company Case #167 E, set forth at pages 8 to 11 of their typewritten answer. (No

printed answer is before me.) The ordinances and other acts which form the basis of the claim of a franchise contract as to rates are set forth as exhibits and attached to said answers.

As to the city of Tacoma, the Exhibits attached to Defendants' Answer in the Pacific Case were admitted by plaintiffs' counsel as pleaded and (see pp. 1909 to 1911 Tr. Test.) were as follows:

Exhibit B, being Ordinance #2522, city of Tacoma, and found at pages 56 to 67 of printed answer in the Pacific Company Case, and Exhibit B-1, being an acceptance of the franchise and Ordinance #2522 found at page 68 of said printed answer, and Exhibit B-2, being an assignment of the franchise of said Ordinance #2522 to the Pacific Telephone and Telegraph Company, being found at pages 69 to 71 of said answer and Exhibit B-3, being Ordinance #6319, consenting to the assignment of the franchise granted under Ordinance #2522 and being found at pages 72 and 73 of said printed answer.

As to the city of Seattle, Defendants' Exhibits Nos. 27, 28, 29 and 30 and Plaintiffs' Exhibits Nos. 101 and 102, all in the Pacific Case, were admitted in evidence. The allegations pleaded were not all admitted as pleaded, but [fol. 278] the evidence in relation thereto is to be found at pages 1912 to 1930 (Tr. Test.) and said exhibits were as follows:

Ordinance #6498, city of Seattle, granting a franchise to John S. McGroarty and George C. Blanker, shown as Exhibit A-1, pages 48 to 50 inclusive of said printed answer, same being also Defendants' Exhibit #27 in the Pacific Company Case. The acceptance of said ordinance is Defendants' Exhibit #28 in Pacific Case. Ordinance #7143, amending Ordinance #6498 and consenting to the transfer of the franchise to the Independent Telephone Company, shown as Exhibit A-2, at pages 51 to 55 inclusive of said printed answer, and is also Defendants' Exhibit #29 in the Pacific Case. The transfer of the franchise from the Pacific Company to F. H. Crosby is Defendants' Exhibit #30 in the Pacific Case.

As to the city of Spokane, the exhibits attached to the answer in the Home Case were admitted by plaintiffs as

pleaded, (see pages 1503 to 1505, Tr. Test.), and were as follows:

Ordinance #A2118, being Exhibit A attached to the typewritten answer of the Defendants in the Home Case, is the ordinance granting a franchise to the Home Telephone and Telegraph Company found immediately following page 11 of said typewritten answer and being marked Exhibit A and being numbered pages 1 to 12 inclusive. Ordinance #A4079, being Exhibit B and amending section 13 of said Ordinance #A2118, being marked Exhibit B and being numbered pages 1 and 2 and being found at the end of said typewritten answer.

The discussions as to this subject are found in the parties' briefs as follows:

Plaintiffs' Brief (Typewritten p. 166 and printed p. 173).
Defendants' Brief (Typewritten p. 2 and printed p. 2).
Defendants' Brief (Winston's Typewritten p. 9).
Plaintiff's Reply Brief (Typewritten p. 69 and printed p. 72).

[fol. 279] In the Public Service Commission law of 1911, passed by the legislature of this state, the Public Service Commission was authorized to modify those franchise rates and terminate them. Section 43 of the Public Service Commission Law of 1911, being Chapter 117 of the Session Laws of 1911 at page 567 and being section 10379 of Remington's Compiled Statutes, authorizes the Public Service Commission to modify franchise contracts as to rates stipulated in said contracts. Said section is as follows:

"Sec. 10379. Existing Contracts—Effect.—Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph com-

pany party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order." (L. '11, p. 567, sec. 43.)

On August 1, 1918, Postmaster General took charge of Pacific and Home Telephones, under authority of a Congressional Resolution.

February 13, 1919, Public Service Commission of Washington made an order establishing the Postmaster General Rates as the rates of the Pacific Company and expressly directed a termination of the franchise rates, and a similar order was made as to the Home Company on March 20, 1919. (See Reports of Public Service Commission of Washington 1918-1919, pp. 153 to 171 as to Pacific Company and Reports of Public Service Commission of Washington, 1918, 1919, pp. 171 to 182 as to the Home Company.)

August 1, 1919, Postmaster General returned the telephones to the Pacific and Home Companies.

[fol. 280] August 8, 1919, the Public Service Commission, upon petition of the Pacific Company, entered an order granting leave to the Pacific Company to continue in effect the rates prescribed by the Postmaster General until the further order of the Commission. The Commission, in cause #3158 at pages 228 of their Report for 1918-19, waived the 30 day notice requirement for hearing of this petition. A copy of this petition and the order of the Commission is to be found at pp. 75 to 79 of Defendants' printed answer in the Pacific Case.

March 3, 1920, the order of February 13, 1919 was held invalid by the Supreme Court of Washington in State ex rel. Seattle v. Public Service Commission, 110 Wash. 130, upon the ground that the State Public Service Commission had no jurisdiction because the telephones were in charge of the Postmaster General.

The order of August 8th, 1919 does not seem to affect the Home Company. The only attempts to affect the Home Company franchise rates is the order of February 13th, 1919, which was held invalid by the Supreme Court of the State of Washington in 110 Washington 130, and the order of March 31, 1923.

I do not deem it advisable to set forth in my findings in haec verba the several exhibits heretofore referred to in

relation to this subject because I believe it will be readily conceded that the rates claimed by plaintiffs to avoid confiscation are higher than the franchise rates and the questions arising therefrom are questions of law.

Conclusions of Law

I believe that it will not be disputed that where a contract is entered into between a duly authorized municipal corporation and a public service corporation fixing rates to be charged by the latter for a definite term not grossly unreasonable in time, that the agreed rates are enforceable [fol. 281] even though they become confiscatory.

St. Cloud Public Service Commission v. St. Cloud, 265 U. S. 352

In the cases before me, I have not heard doubted the authority of the several municipal corporations involved to enter into franchise contracts with public service companies. They are all municipal corporations of the first class. The question then is, did the action of the commission in changing the franchise rates terminate the franchise rates?

The intention of the legislature of the state of Washington in the passage of the act of 1911 heretofore quoted as Remington's Compiled Statutes 10379, is shown by the following quotation from the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107, pp. 111, 112.

"By the act of 1911 (Laws of 1911, p. 561, sec. 34) the terms of a franchise contract like the one in question here are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. State ex rel. Ellertsen v. Home Tel. and Tel. Co., 102 Wash. 196, 172 Pac. 899; In the case of State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D 78, L. R. A. 1915 C 287, it was decided that the public service commission law placed the entire subject of rate regulations under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was

decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite [fol. 282] of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case."

It was held in State ex rel. Spokane Falls Gas Light Co. v. Kuykendall, 119 Wash. 107, that the fact that the order fixing new rates which did not in express terms terminate the franchise rates made no difference and that the order then being considered fixed rates but did not expressly terminate the franchise rates and was "just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done and the form or language by which it was accomplished is not very material."

It seems to me, after a careful perusal of the Spokane Falls Gas Light Company v. Kuykendall, (supra), and I so conclude as a matter of law, that the effect of the action of the Public Service Commission in its order of August 8, 1919, in continuing in effect the rates established by the Postmaster General, that it did terminate the franchise rates and that after such termination the franchise rates are out of legal existence. I cannot agree with defendants' counsel in their contention that the new rate fixed by the Public Service Commission is merely an amendment of the original franchise contract and that the new rate is thereafter a contract rate.

And to the same effect is the order of March 31, 1923 as to both Pacific and Home Companies.

I believe that the fixing of the new rates by the Commission terminates the old franchise rates as far as it exists as [fol. 283-289] a contract rate, and it thereafter becomes and remains a public service commission rate, and I so conclude as a matter of law.

This is the only conclusion that will carry into effect the State's intention as expressed by the Supreme Court of Washington that the entire subject of rate regulation be placed under the control of the public service commission, and that no contract between a city representing the public and the public service company would be allowed to interfere with that control.

See State ex rel. Spokane v. Kuykendall (supra).

And I do not believe that this conclusion is in any way affected by the rather recent ruling of the Supreme Court of Washington in the case of Monroe Water Works v. Monroe, decided July 15, 1925, and reported in volume 35 of Washington Decisions at page 232 and in volume 237 Pacific Reporter at page 996.

[fols. 290-295] In United States District Court

Exceptions to Report of Special Master—Filed October 1, 1925

Come now the defendant in the above entitled cause, and except to the report of John T. Condon, the special master in chancery, appointed by this court, which report was returned to the clerk's office of said district court on the 15th day of September, 1925, and allege the following grounds for exception:

* * * * * * *

[fol. 296] 15

They except to the conclusion of the Master (p. 120, 121), (p. 136 printed copy), that the orders of the department of public works, one of February 13, 1919, and one of March 31, 1923, being the order under review, terminated the franchise rates, for the reason that the same is contrary to law. The first order referred to was invalid because of lack of jurisdiction. The second order referred to did not change in any manner the existing rates. The said conclusion of the Master fails to give proper effect to the state statute and fails to conclude, as it should, that a franchise contract exists between the complainant and the city of Spokane. It assumes jurisdiction to be in the Federal [fols. 297 & 298] court by virtue of the confiscation clause of the Federal Constitution. Said franchise rates can only be further modified by the department of public works in the manner provided by statute.

* * * * * * *

[fols. 299 & 300] 19

They except to the conclusion of the Master, (p. 126), (p. 143 printed copy), that the temporary injunction heretofore granted in this case be made permanent, for the reason that the same is contrary to the law and the evidence, for the specific reasons assigned in preceding exceptions.

20

They further except to the conclusion of the Master, (p. 126), (p. 143 printed copy), that the temporary injunction be made permanent, for the reason that such conclusion is wholly unsupported by the findings or conclusions of the Master with respect to the effect of said order, on the property and revenues of the plaintiff, subsequent to June 30, 1922, and is wholly unsupported by any finding or conclusion of the Master that the property of the plaintiff has been confiscated since June 30, 1922, or is now being confiscated by reason of any order of the department of public works. (Amended and Supp. Compt. Pars. XIX & XXI.)

Dated this 30th day of September, 1925.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants. J. M. Geraghty, Alex. M. Winston, of Counsel.

[fol. 301] In United States District Court

[Title omitted]

Before Rudkin, Circuit Judge, and Neterer and Webster, District Judges

Opinion—Filed April 22, 1926

Webster, District Judge:

These cases, by agreement of counsel consolidated for [fol. 302] the purpose of taking testimony before the Special Master, have been dealt with by him in a single report,

and will therefore be considered together. No attempt will be made to detail the history of this complicated and protracted litigation as it has taken its course through State and Federal Courts. For the purpose of our present inquiries it will perhaps suffice to say that on March 31, 1923, the Department of Public Works of the State of Washington (hereinafter called the Department) made two orders affecting these plaintiffs, one purporting to determine for rate making purposes the value of the property of the Home Telephone and Telegraph Company of Spokane (hereinafter called the Home Company), and the other a like order fixing the value of both the intrastate and interstate property of the Pacific Telephone and Telegraph Company (hereinafter called the Pacific Company). A few days later these suits were commenced by these two companies, alleging that the rate orders promulgated by the Department were confiscatory of the property of the companies respectively, and consequently in violation of the Federal Constitution. The cases are now before the Court pursuant to Section 266 of the Judicial Code as amended upon exceptions to the report of the Special Master, to whom the cases were in due course referred.

The Special Master found the fair and reasonable value of the Pacific Company's intrastate property devoted to the public service, as of June 30, 1922, to be $31,425,403.75 including average working capital; to which there should be added $720,000.00 found to be the "going concern value" of that Company's property, making a total value or rate basis on which that Company was entitled to a fair and reasonable return of $32,145,403.75; and the equivalent figure for the Home Company was fixed at $4,548,021.76. The [fol. 303] Special Master further found the fair and reasonable rate of return which the companies were entitled to earn as of June 30, 1922, to be seven and one half per centum per annum. In addition he found that the net revenue of the Pacific Company as of June 30, 1922, was $928,081.97, and the corresponding figure for the Home Company was $126,081.97, on the basis of the rates then allowed, and that these revenues would produce a return of less than three per centum per annum for each company. From these findings he concluded as a matter of law that the effect of enforcing the orders of the Department complained of

would be to confiscate the property of the companies respectively, and recommended that a permanent injunction be granted restraining the Department from putting such orders into effect. The correctness of these Findings and Conclusions is now challenged by exceptions, which give rise to the following principal questions:

One. What is the fair and reasonable value of the properties of the two companies respectively which is held for and used in the public service—that is to say, what is the proper value of such properties as the lawful basis for a rate structure.

Two. In determining this, should working capital be allowed.

Three. Should "going concern value" be taken into account, and if so, how should such amount be ascertained.

Four. What amount should properly be deducted for depreciation, and how is this amount to be arrived at.

Five. Are the licenses contracts involved valid and to be given their face effect.

And, finally, what was a proper rate of return to be allowed each Company upon the property devoted by it to the public use as of June 30, 1922.

The subordinate and incidental problems to which these major considerations necessarily give rise will be noticed in their proper places and connections.

At the threshold we face the query—what were the physical properties of the companies respectively as of June 30, 1922? During 1913, 1914 and 1915, at a cost of approximately $125,000.00, the Pacific Company made a detailed and complete inventory of all its property in the State of Washington. As to central office equipment, buildings, and certain other important items of property an actual field count and appraisal was made. In case of other classes of property as careful and accurate a survey was made as of the nature of the millions of small items comprising it rendered practicable. This inventory and appraisal consisted of fifty four volumes containing an average of four hundred pages each. It was completed in the early part of 1915, and subsequently was brought down to December 31, 1921, by a

system of accounting as advocated by various and numerous text books. The work was in charge of an expert in such matters, who testified: "It is a close a determination of the precise facts as it is humanly possible to make it." There is little in the record challenging the correctness of appraisal and the Special Master was amply justified in finding that it is as accurate, thorough and complete as it is practical to make it, and is all that should in reason be required. The cost of reproducing the property of the Home Company, with the exception of its going concern value, was stipulated by the parties and therefore needs no discussion. Taking then the detailed inventory and the stipulation as the basis of the physical properties of the two companies, we pass naturally to the ascertainment of [fol. 26] the proper rules to be followed, the proper elements and factors to be considered, in fixing the value of such property for rate making purposes.

In Smyth v. Ames, 169 U. S. 466, pp. 546-547, the Supreme Court said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative control must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value the original cost of construction, the amount sacrificed in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

In Willcox v. Consolidated Gas Company, 212 U. S. 19, p. 52, the Supreme Court said:

"If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such

increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, etc."
[fol. 306] In the Minnesota Rate Cases, 230 U. S. 352, p. 456, this principle is stated:

"The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."

In Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 262 U. S. 276, the Public Service Commission undertook to value the property there involved without according any weight to the greatly enhanced cost of material, labor and supplies. In reviewing this action, at page 287 of the opinion, the Court said:

"It is impossible to ascertain what will amount to fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

In Winfield Water Works and Improvement Company v. Public Service Commission, 262 U. S. 679, p. 689, this language is found:

"The record clearly shows that the commission in arriving at its final figure did not accord proper, if any, weight to the greatly enhanced costs of construction in 1920 over those prevailing about 1913 and before the war, as established by uncontradicted evidence; and the company's detailed estimated cost of reproduction new, less depreciation, [fol. 307] at 1920 prices, appears to have been wholly disregarded. This was erroneous."

Federal and State cases holding to the same view almost without number might be cited. It is true that in the case of Georgia Railway and Power Company v. Railroad Commission, 262 U. S. 625, the Supreme Court said:

"The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical prop-

erties of a utility must be valued at the replacement cost less depreciation was clearly correct."

The facts of this case, however, and its subsequent history, clearly indicate that the reason for this statement was that at the time of making the estimation of values the prices prevailing were abnormal or peak prices which afforded no true or just criterion of reproduction costs under stable or normal economic conditions. Plainly, the rule of reproduction cost less depreciation is not an invariable and inflexible one, to be arbitrarily applied in all cases without regard to other factors and elements. To be sure, there must be no slavish adherence to it. Like most general rules it has exceptions, limitations, and qualifications, and must always be applied to concrete facts with due regard for the fundamental consideration that the utmost any public utility can rightfully demand at the hands of rate making bodies is such compensation for the use of its property as will, under all the circumstances existing at the time, be just, both to it and to the public. A careful study of the cases, however, leads unerringly to the conclusion that one of the most important factors, if not the dominant factor, in determining the true basis of rate making for [fol. 208] public utilities is the cost of reproduction new less depreciation of the property of the utility devoted to the public convenience, at the time of making the rates, provided such cost fairly reflects normal and stable prices prevailing at the time, and also prices which will with reasonable certainty continue to prevail throughout the period covered by the rates fixed, so far as reasonable human foresight, measuring the future by the present and the past, can determine. This is what the utility is supplying for the public service, and it is this of which it would be unjustly deprived by confiscatory rates, fares, tolls, or charges.

There is practically no controversy concerning the original cost of the properties of the two companies. This [illegible] as effect stipulated by the parties.

The Department, in its orders of March 31, 1923, which gave rise to this litigation, took for the basis of its promulgated rates the original cost of the properties to the companies respectively, and gave no consideration to any other elements or factors of value, this being done on the prudent

investment theory which the decisions of the Supreme Court of Washington seem to hold is the method required by the state statute defining the powers of the Department.

Pacific Coast Elevator Company v. Department, 130 Wash. 620.

State ex rel. Spokane Gas Company v. Kuykendall, 119 Wash. 107.

This method of valuation was rejected by the Special Master. In its stead he applied the rules announced in Smyth v. Ames, supra, as explained and qualified by the later holdings of the Supreme Court, attaching no importance to the factor of the value of stocks and bonds upon the authority of the Minnesota Rate Cases, supra. In so [fol. 309] doing he was clearly right. Granting the correctness of the method employed, there is little room for criticism of his calculations and conclusions as to the fair and reasonable value of the properties of the companies. No useful purpose would be served by following the labyrinth of details involved in his extremely burdensome task.

We pass now to the question of depreciation. From the cost of reproducing new the properties of the companies must be deducted depreciation, representing the difference between new property and property in the condition it was at the time of the estimate. How should this be done? In the case of the Home Company the amount of depreciation is stipulated, hence calls for no discussion. The question of depreciation in the case of the Pacific Company presents a more difficult problem. The proper method for determining depreciation seems now quite well settled. In Pacific Gas and Electric Company v. City and County of San Francisco, 265 U. S. 403, p. 436, the Supreme Court said:

"Appellant objects to the application of this method and insists that depreciation should have been ascertained upon full consideration of the definite testimony given by competent experts who examined the structural units, spoke concerning observed conditions and made estimates therefrom. As these examinations were made subsequent to the alleged depreciation for the definite purpose of ascertaining exist-

ing facts, we think the criticism is not without merit. Facts shown by reliable evidence were preferable to averages based upon assumed probabilities."

In other words, it was held that accrued depreciation is to be ascertained by an inspection of the property—by going [fol. 310] and looking at it and making estimates based upon the facts which such examination discloses.

To the same effect see:

New York Telephone Company v. Prendergast, 300 Fed. 822.

Southern Bell Telephone and Telegraph Company v. Railroad Commission, 5 Fed. (2d) 77.

Westinghouse Electric & Mfg. Company v. Denver Tramway Company, 3 Fed. (2d) 205.

Landon v. Court of Industrial Relations, 269 Fed. 433.

On the question of depreciation the companies produced witnesses Blanck and Fleager, while the defendants called on this point witnesses Hill, Wray and Green. The Special Master, with commendable painstaking and scrutiny, examined the conflicting evidence and concluded that the testimony of witnesses Blanck and Fleager, in view of their superior experience and opportunities, and notwithstanding the fact that they were employees of the Pacific Company, was the more satisfactory, convincing and dependable. The record convinces us that he was justified in taking this view of the matter. To undertake to fortify this conclusion by minute analysis of the voluminous record would but serve unduly to lengthen this opinion without giving it added value.

It seems plain from the record, and the Special Master so found, that the three and one half per centum per annum of the depreciable property of the companies fixed by the Department was not sufficient to take care of the actual depreciation which was bound to occur, and was intentionally fixed at a lesser amount for the purpose of reducing what it conceived to be an excessive depreciation reserve fund. [fol. 311] Such a method finds little support in law or reason. The depreciation to be taken into account in ascertaining the rate base is that diminution in the value of the

property involved which takes place in the physical thing and is ascertained by a physical inspection of it—not the future depreciation which inevitably comes about by wear, tear, obsolescence, and the like. The ascertainment of the amounts necessary for the latter purpose sheds no light on the present value of the properties of the companies for the purpose of present rate making. Indeed, it was not fixed by the Department for any such purpose. The precise question of whether it is permissible for a rate making body to reduce what it considers an excessive depreciation reserve fund by making inadequate provision for future depreciation was considered in New York Telephone Company v. Board of Public Utility Commissioners, 5 Fed. (2d) 245, and the practice was condemned.

The amount of average working capital of both companies was stipulated by the parties and was properly taken into account by the Special Master under the authorities already cited.

In the hearing before the Special Master it was not disputed that in a case presenting proper proof thereof "going value," "going concern value," or "value of plant in successful operation" (which are synonymous terms) should be taken into account. The Special Master aptly defines this item in the following language:

"This is the additional value that a purchaser will give for the properties and business of the companies because they are going concerns with established business. * * * This additional value, over and above the fair and reasonable value of the physical properties plus the working capital, which a customer would pay for the property be- [fol. 312] cause it is a going concern, and which additional value we call 'going value,' does not depend upon past losses in operations, successfully survived, or in expenditures, wisely made, contributing to 'going value,' but they are not the measure of the amount of 'going value.'"

He studiously avoided making any allowance for development cost and likewise repudiated the theory of capitalization of the net balance of alleged past deficits. He rightly held that this item of value rests largely in competent or expert opinion, and accepted in the case of the Pacific Company the amount testified to by the defendants' expert, Mr.

Green. Under the authorities there can be little doubt as to the correctness of his action in this respect. As to the amount allowed, the defendants' view was accepted and they are in no position to complain. For cases discussing going value and the propriety of its allowance as an intangible part of the rate base, see:

Galveston Electric Company v. Galveston, 258 U. S. 388.

Houston v. Southwestern Bell Telephone Company, 259 U. S. 318.

Georgia Railway and Power Company v. Railroad Commission, 262 U. S. 625.

Mobile Gas Company v. Patterson, et al., 293 Fed. 208.

Pacific Gas and Electric Company v. San Francisco, 273 Fed. 937.

In the case of the Home Company, for want of proper proof, no allowance of going concern value was made.

We pass now to a consideration of the licensee or so-called four and one-half per cent. contracts. These are [fol. 313] contracts whereby the Pacific Company and the Home Company pay to the American Telephone and Telegraph Company four and one-half per cent. of the gross revenues of the companies respectively, for which the American Company supplies to the Pacific Company and the Home Company certain instrumentalities, appliances, patents, and services, not necessary to detail. The Department, in its orders of March 31, 1923, held that these contracts were wrong in principle and contrary to public policy, and substituted in lieu of the percentage of revenue payment as provided in the contracts an annual per station charge of ninety cents. The Special Master took proof touching the validity of these contracts and found as a fact that they were of great value to the Pacific and Home companies as well as to the public, and were not contaminated with fraud or bad faith. As a matter of law he concluded that they were valid obligations, and the amounts paid under them lawful expenditures. As we read the cases, the question presented by this aspect of the case has been foreclosed by the Supreme Court. In Houston v. South-

western Bell Telephone Company, 259 U. S. 318, p. 323, the court said:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone & Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished and that, for this [fol. 314] unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business, but it did introduce much evidence tending to show that the charges made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone & Telegraph Company controlled the company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the court recognized and applied this rule. Here again, the evidence introduced by the City was meager and indefinite, while that of the Company was exceptionally full and complete, and both contentions must be denied."

Again, in State of Missouri ex rel. v. Public Service Commission, 262 U. S. 276, 288, in dealing with those contracts the Court said:

"The important item of expense disallowed by the Commission—$174,948.00—is 55% of the 4½% of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter

company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of di- [fol. 315] rectors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company, 291 Ill. 209, 234.

"'The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'"

For additional cases to the same effect, see:

State v. Southwestern Bell Telephone Company (Kansas), 223 Pac. 771.

Indiana Bell Telephone Company v. Public Service Commission, 300 Fed. 190.

Chesapeake and Potomac Telephone Company v. Whitman, 3 Fed. (2d) 938.

Southern Bell Telephone and Telegraph Company v. Railroad Commision, 5 Fed. (2d) 77.

Northwestern Bell Telephone Company v. Spillman, 6 Fed. (2d) 663.

Cincinnati v. Public Utility Commissioners, 149 N. E. 817.

An examination of the foregoing cases leaves no doubt as to the validity of those contracts and that the amounts paid under them are properly chargeable to operating expenses. [fol. 316] At this point it seems convenient to consider the contention of counsel that the Pacific and Home Companies are bound by the orders of the Department entered on March 31, 1923, because in the case of the Pacific Company it did not appeal to the State Courts as provided by the

State statute, and in the case of the Home Company it did not prosecute its appeal in time. Prior to March 31, 1923, however, the Supreme Court of Washington had construed the state statute as meaning that in fixing valuations for rate purposes the Department should not recognize the theory of reproduction new less depreciation, but was confined to the cost method prescribed by the statute.

State ex rel. City of Spokane v. Kuykendall, 119 Wash. 107.

And on September 22, 1924, subsequent to the orders complained of, in Pacific Coast Elevator Company v. Department, 130 Wash. 620, this holding was approved and redeclared. It is obvious therefore that an appeal to the State Courts by the companies would have been an idle and useless formality. Moreover, the plaintiffs here are seeking relief against the orders of the Department upon the ground that such orders are confiscatory, and therefore in violation of the Federal Constitution. In such a case it is clear that the Federal tribunals are not bound by the action of the State Department, but it is their imperative duty to exercise an independent judgment on both law and facts. It has been pointedly so held in a number of cases.

Bluefield Company v. Public Service Commission, 262 U. S. 679.

[fol. 317] Ohio Valley Water Company v. Ben Avon Borough, 253 U. S. 287.

Monroe Gaslight and Fuel Company v. Public Utilities Commission, 292 Fed. 139.

Van Wert Gaslight Company v. Public Utilities Commission, 299 Fed. 670.

With respect to the question of the proper rate of return to be taken into consideration in determining whether the orders of the Department complained of are confiscatory, the Special Master concluded that a return of less than seven and one-half per centum upon the fair value of the property, plus working capital and going concern value, would be confiscatory. The principles to be applied in determining what constitutes a confiscatory rate are stated by the Supreme Court in the Bluefield case, supra, as follows:

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public [fol. 318] duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."

After reviewing former decisions of the courts dealing with the question, the Court uses this language:

"Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it."

The conclusion reached was that a rate of return of six per centum upon the value of the property was substantially too low to constitute just compensation for the use of the property employed in rendering the public service. This opinion was handed down June 11, 1923. In the South-

western Bell Telephone Company case, 262 U. S. 276, p. 288, decided May 21, 1923, the Supreme Court said:

"That 6% should be allowed for depreciation appears to be accepted by the Commission. Deducting this would leave a possible 5 1/3% return upon the minimum value of the property, which is wholly inadequate considering the character of the investment and interest rates then prevailing."

[fol. 319] In Pacific Gas and Electric Company v. City and County of San Francisco, 265 U. S. 403, decided June 2, 1924, the Master in Chancery had held that any rate of return less than seven per centum would be confiscatory. In reviewing this point, at page 405, the Supreme Court said:

"We think the evidence supports the finding that a net return of seven per centum was necessary in order to avoid confiscation."

In Consolidated Gas Company v. Prendergast, 6 Fed. (2d) 243, Judge Winslow upheld a rate of eight per cent. In Kings County Lighting Company v. Prendergast, 7 Fed. (2d) 192, a statutory three-judge court made up of Judges Manton, Campbell and Inch, approved a rate of eight per cent. In Indiana Bell Telephone Company v. Public Service Commission, 300 Fed. 180, a rate of eight per cent was sustained. In State v. Southwestern Bell Telephone Company, 223 Pac. 771, the Supreme Court of Kansas upheld a rate of eight per cent. We have noticed these cases particularly for the purpose of showing the trend of thought touching this matter, as disclosed by the latest expressions of the courts in various parts of the country. There was competent and reliable evidence amply supporting the conclusion of the Special Master. The proper principles, as defined by the courts, were applied, and the figure fixed by him was within the limits marked by the controlling cases. Moreover, this Court is not engaged in the task of fixing rates for public utilities, and even if it be thought that the rate of return fixed by the Special Master is excessive, it is obvious that, measured by a substantially lower rate of return, the orders of the Department here under review [fol. 320] would nevertheless be confiscatory, because of the improper rate base adopted by the Department.

In behalf of the cities of Seattle, Tacoma and Spokane, it is contended that the plaintiff companies are entitled to no relief because in these cities the companies were operating under franchises which prescribed rates substantially lower than those allowed by the Department, and that the franchise rates are controlling, particularly since the Department did not expressly and in pointed terms abrogate and cancel them. It cannot be doubted that where a franchise contract is entered into between a municipality and a public utility corporation fixing rates to be charged by the latter for a not grossly unreasonable period of time, such rates are binding and enforceable, even though confiscatory of the property involved.

> St. Cloud Public Service Company v. City of St. Cloud, 265 U. S. 352.

Nor can it be doubted that under the statutes of the State of Washington the Department has the power to abrogate and cancel such franchise rates if in a proper case it sees fit to do so. Section 10379 of Remington's Compiled Statutes of Washington provides:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its lines, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts; Provided, however, that the commission shall have [fol. 321] power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. (L. '11, p. 567, sec. 43.)"

Construing this statute in the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107, pp. 111-112, the Supreme Court of Washington said:

"By the act of 1911 (Laws of 1911, p. 561, par. 34) the terms of a franchise contract like the one in question here

are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. State ex rel. Ellerton v. Home Tel. & Tel. Co., 102 Wash. 196, 172 Pac. 909. In the case of State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913B 78, L. R. A. 1916C 207, it was decided that the public service commission law placed the entire subject of rate regulation under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be a duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case."

In this same case the point was urged that the Department, in fixing the new rates, did not in express terms [fol. 322] cancel and terminate the franchise rates. In meeting this contention the Court said:

"The present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court. The Special Master concluded that the order of the Public Service Commission (now the Department of Public Works) entered on August 6, 1918, and after the termination of federal control of the properties, continuing in effect the rates established by the Postmaster General so far as the Pacific Company is concerned, and the orders of the Department to the same effect

[illegible] on March 18, 1925, as to both the Pacific and the [illegible] Company, and the effect of terminating and abrogating the franchise ports, and that the ports established by the Department in their stead become "Department" or "statutory" ports, as distinguished from "franchise" or "contract" ports. In this, no ports will be [illegible]

[illegible] v. [illegible],

[illegible] that the Department was not obliged to grant any relief against the ports established in the franchises, and that it could not by judicial action be compelled to do so. For, if it undertakes to terminate such ports [illegible] pursuant to its plain statutory powers, the ports [illegible] must be free, just and reasonable. If the plain mandate of the statute forbids the latter it is to be obeyed. And when the [illegible] ports are challenged they must be considered as statutory — not franchise — ports, and their character as being confiscatory, or not, must be measured by the principles of law applicable to such ports.

Voluntary effort is made upon the Pacific Company's [illegible] of existing maritime commerce for one to the [illegible] of Seattle. It is asserted that the ratios are unnecessary, unreasonable and injurious. The Department, in the Pacific Company order of March 18, 1925, expressly found "the installation of maritime services to Seattle to [illegible] find." There is no evidence in the record which would warrant a contrary conclusion. Seattle is a progressive and rapidly growing city. Facilities which are equal to the present requirements may be grossly inadequate in the reasonably near future. Public service companies cannot wait until their facilities have been or prove unequal to the demands upon them before making needful additions and improvements. Business judgment must be employed to anticipate reasonably future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the ratios to suggest dishonest, wasteful or improvident operations. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be arbitrarily frustrated under the guise of rate making. In the absence of evi-

driven to the contrary, movement may reasonably be assumed to have been made in the exercise of reasonable judgment.

[Ind.][Ill.] Missouri ex rel. v. Public Service Commission supra.

See also:

Northwestern Bell Telephone Company v. Spellman, 6 Fed. (2) 483.

The finding of the Special Master that this expenditure was judicious and proper is clearly right.

[illegible] for the City of Spokane with great earnestness complains of the allocation of toll line charges made as between the Home Company and the Pacific Company. It is contended that the amount received by the Home Company is substantially less than the actual cost of supplying the service. It is further contended that the arrangement is unreasonable. It is not apparent to us, however, how relief against that situation may be granted in this case. It appears, nevertheless, that contracts of the same kind and in fact contracts less favorable to the small companies are usually entered into all over the country by telephone companies, including independent as well as subsidiary companies. That such a division of the joint tolls, in spite of superficial appearances to the contrary, is not unfair or unreasonable would seem to be sustained by the fact that it embodies the customary and usual method of adjustment adopted by the parties, dealing in the light of practical experience in such matters.

City of Spokane v. Northwestern Bell Telephone Company, 268 F. 3, 12, p. 122

The Special Master found that in view of all pertinent considerations the contract was of great benefit to the Home Tel. [illegible] Company and its patrons. We do not find [illegible] in disturbing that finding.

For the foregoing reasons, the exceptions to the report of the Special Master will be overruled, and the permanent injunction recommended by him will be granted. A decree accordingly may be presented. Before finally passing the

determine the amount of allowance to cover the services of the Special Master will be determined.

[File endorsement omitted.]

[fol. 130] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DECREE—Filed May 19, 1926

This cause came on to be heard on the 21st day of November 1925, upon the report of the Special Master, John T. Condon, duly discharged, the exceptions of the parties thereto was argued by counsel for the respective parties and was then submitted, and having been duly considered, it is now ordered, adjudged and decreed as follows:

I

That each and all of the defendants' exceptions be and they are hereby overruled.

II

That the plaintiff's exceptions be and they are hereby overruled.

III

That the rates and charges prescribed by the Department of Public Works of the State of Washington, which said rates and charges are set forth in a certain schedule, a copy thereof is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "A" be and they hereby are decreed to be confiscatory in violation [fol. 131] thereof of the Constitution of the United States; and that the order of said Department of Public Works approving said rates and charges made on March 31, 1925, a copy of which said order is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "B", be and the same hereby is decreed to be void and of no effect.

IV

That said defendants, and each of them, their successors in office and all others persons, be and they are hereby forever restrained and enjoined—

First. From any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges prescribed by said Department of Public Works as set forth in said schedule Exhibit "A" or from any attempt to compel the plaintiff to continue to observe or maintain said rates and charges.

Second. From any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees from charging and collecting the rates and charges set forth in a certain schedule, a copy of which is attached to the amended and supplemental complaint in the above entitled cause and marked Exhibit "F," until just and reasonable schedules of rates and charges are established by law.

Third. From taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees for disregarding the rates and charges set forth in said Exhibit "A" or for charging and collecting the rates and charges set forth in said Exhibit "F" until just and reasonable schedules of rates and charges are established by law.

Fourth. That all bonds given by the plaintiff herein pursuant to the terms and conditions of the interlocutory in[fol. 328] junction entered in this cause on the 23rd day of July, 1924, are hereby cancelled and discharged and the plaintiff and its sureties are thereon are hereby released and discharged from all liability thereon.

Fifth. That plaintiff recover of the defendants and have judgment for its costs in this suit taxed at $8,972.07 including therein the sum of Four Thousand and no 100 Dollars heretofore allowed by this court as the fee of the Special Master, and which said sum has been theretofore paid by

the plaintiff to Marian Clark Condon, executrix of the estate of John T. Condon, deceased.

To all of which defendants except.

Done in open court this 18 day of May, 1926.

Frank H. Rudkin, Circuit Judge. Jeremiah Neterer, District Judge. J. Stanley Webster, District Judge.

[File endorsement omitted.]

[fol. 329] In United States District Court

[Title omitted]

Order of Substitution—Filed August 17, 1926

Now on this day the application of defendants to substitute O. O. Calderhead as Supervisor of Transportation in place of Frank R. Spinning and C. Rea Moore as Supervisor of Public Utilities of Washington in place of O. O. Calderhead as defendants in the above entitled cause came on to be heard, and it appearing to the court that the notice of motion for substitution and the affidavit of H. C. Brodie, one of the solicitors for defendants, have heretofore been filed in this court and served upon Otto B. Rupp, Post Russell & Higgins and Pillsbury, Madison & Sutor, solicitors for plaintiff, and the court having listened to the arguments of counsel, it is Ordered that O. O. Calderhead, the Supervisor of Transportation of Washington, be and he hereby is substituted as defendant herein in place of Frank R. Spinning, who on July 31, 1925 resigned said office; and that C. Rea Moore, the Supervisor of Public Utilities of Washington be and he hereby is substituted as defendant in place of O. O. Calderhead, who on August 1, 1925 resigned said office to accept the office of Supervisor of Transportation; all without prejudice to the proceedings [fol. 330] already had in this action.

Done in open court this 16 day of August, 1926.

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 331] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERROR—Filed August 17, 1926

Come now John C. Denney, as Director of Public Works of Washington, O. O. Calderhead, as Supervisor of Transportation of Washington, and C. Rea Moore, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, defendants in the above entitled cause, and file the following assignment of errors on which they will rely on their appeal from the decree entered in the above entitled cause on the 18th day of May, 1926:

I

The court erred in making and entering the decree of May 18, 1926.

[fol. 332]

II

The court erred in overruling defendants' exception No. 15, to the report of the master.

III

The court erred in overruling defendants' exception No. 19, to the report of the master.

IV

The court erred in overruling defendants' exception No. 20, to the report of the master.

V

The court erred in not finding that the plaintiff is now, and has been ever since the beginning of this action, operating its exchange in the City of Spokane under a valid franchise contract, which prescribed a maximum schedule of rates for both business and residence telephones, and which franchise rates as modified by the orders of the defendants and their predecessors in office, were and are less than the rates prescribed in the schedule attached to the amended and supplemental bill of complaint herein, and that for that

reason, the orders of the predecessors in interest of the defendants did not deprive plaintiff of its property without due process of law and did not deny to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment of the Constitution of the United States.

VI

The court erred in finding that the order of the Department of Public Works referred to in defendants' exception No. 15, to the conclusion of the master under date February 13, 1919, terminated the franchise contract between the plaintiff and the city of Spokane for the reason that said order was invalid for lack of jurisdiction.

[fol. 333]

VII

The court erred in finding that the order of the defendants' predecessors in office, of date March 31st, 1923 being the order under review, terminated the franchise contract between the plaintiff and the City of Spokane, for the reason that said order did not attempt in any manner to change the then existing rates.

VIII

The court erred in holding that Section 10379 of Remington's Compiled Statutes of the State of Washington, authorized the defendants' predecessors in office to terminate the franchise contract existing between plaintiff and the City of Spokane because of an alleged construction of said Section by the Supreme Court of the State of Washington in the case of State ex rel. Spokane v. Kuykendall, 119 Wash. 107.

IX

The court erred in holding that the alleged construction of said Section by the Supreme Court of the State of Washington was binding upon it and that it did not exercise its independent judgment in construcing said Section.

John H. Dunbar, Attorney General for The State of Washington; H. C. Brodie, Assistant Attorney General for the State of Washington, Attorneys for Appellants. J. M. Geraghty, Alex M. Winston, of Counsel.

[File endorsement omitted.]

[fol. 334] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 17, 1926

The above named John C. Denney, as Director of Public Works of Washington, O. O. Calderhead, as Supervisor of Transportation of Washington, and C. Rea Moore, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, feeling themselves aggrieved by the decree entered in the above entitled cause on the 18th day of May, 1926, granting a permanent injunction against these defendants, do hereby appeal from said decree to the Supreme Court of the United States and pray that this, their appeal, may be allowed and that a transcript of the record and proceedings in said cause and all things concerning the same upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herein filed by the said defendants may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

[fol. 335] John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants. J. M. Geraghty, Alex M. Winston, of Counsel.

[File endorsement omitted.]

[fol. 336] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 17, 1926

It is hereby ordered that the appeal prayed for by the above named defendants in the above entitled cause to the

Supreme Court of the United States be and same is hereby allowed as prayed.

Done in open court this 16 day of August, 1926.

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fol. 337] In United States District Court

[Title omitted]

Order Fixing Bond—Filed August 17, 1926

On reading the petition of the above named defendants in the above entitled cause for the allowance of an appeal to the Supreme Court of the United States from the decree rendered in said cause on May 18, 1926, granting a permanent injunction against the defendants, it is ordered that the defendants above named execute and file in the office of the clerk of the above entitled court a bond on appeal conditioned according to law in the sum of One Thousand Dollars ($1,000.00) with good and sufficient surety to be approved by the undersigned.

Done in open court this 16 day of August, 1926.

Jeremiah Neterer, Judge.

[File endorsement omitted.]

[fols. 338-340] Bond on appeal for $1,000 approved and filed August 17, 1926, omitted in printing.

[fols. 341-343] Citation, in usual form, showing service on O. B. Rupp et al., filed August 17, 1926, omitted in printing.

[fol. 344] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed August 17, 1926

To the clerk of the above entitled court:

Please make and certify on appeal to the Supreme Court of the United States, a record which includes the following files, to-wit:

1. Amended and supplemental complaint and Exhibits thereto attached.
2. Joint answer of defendants to amended and supplemental complaint with Exhibits thereto attached;
3. Report of John F. Condon, Special Master in Chancery;
4. Defendants' exceptions to Master's report;
5. Opinion of three judges filed April 22, 1926;
6. Decree of May 18, 1926;
7. Order of substitution;
8. Assignment of errors;
9. Petition for allowance of appeal;
10. Order allowing appeal;
11. Order fixing amount of bond on appeal;
12. Bond on appeal;
13. Citation;

[fol. 345] 14. Acceptance of service;

15. This præcipe and acknowledgment of service attached thereto.

Omit all captions except on amended and supplemental complaint.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Defendants.

Due regular and timely service of the foregoing præcipe is hereby acknowledged this 16th day of August, 1926.

Otto B. Rupp, Post & Russell, Pillsbury, Madison & Sutro, Solicitors for Plaintiff.

[File endorsement omitted.]

[fol. 346] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 347] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellants of Parts of Record to be Printed—Filed December 13, 1926

I

The appellants contend that a valid franchise contract now exists between the plaintiff and the City of Spokane, for the furnishing of residence and business telephonic service at maximum prices of less than the prices contained in the schedule filed by the plaintiff with the Department of Public Works and attached to the amended and supplemental complaint as Exhibit "A".

II

From the answer of the defendants to plaintiff's amended and supplemental complaint, it appears that in the year 1905 the plaintiff was granted a franchise by the City of Spokane for the erection, maintenance and operation of a telephone system for a period of thirty-five years and is now operating under said franchise. Under the terms thereof, the plaintiff agrees to furnish service, residence and business, at rates not to exceed a maximum in said franchise set forth, and such rates were less than the rates charged by plaintiff prior to the institution of this suit. It was determined by the Supreme Court of the State of Washington, that this franchise ordinance constituted a [fol. 348] valid contract between the plaintiff and the City of Spokane, subject to the power of the defendants and their predecessors in office to modify the terms thereof as to the maximum charges. The predecessors in office, of the defendants, on February 13, 1919, issued an order permitting the departure from said franchise rates and substituting other rates to be charged by the plaintiff.

It is the contention of the appellants that this order is void because of lack of jurisdiction on the part of the de-

fendants' predecessors in office, the telephone systems of the United States being then under the control of the government.

III

Another order was made by the defendants' predecessors in office on March 31st, 1923, this being the order under review herein. This order denied the plaintiff the right to a further raise in rates.

It is the contention of the appellants that in view of the fact that this order did not in any wise, change the existing rates, that plaintiff acquired no rights by the making thereof.

IV

Section 10379 of Remington's Compiled Statutes of the State of Washington, provides:

"Existing contracts—Effect.—Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order."

[fol. 349] It is appellants' contention that when the statute says, that "thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order" that the true meaning thereof is that the defendants and their predecessors in office have the power and authority to modify the franchise contract in question and that by the orders in question, if effective at all, the contract was modified as directed, and as modified still exists.

V

The lower court held that such orders terminated the contract for all purposes, following an alleged construction of the statute of the Supreme Court of the State of Washington.

It is appellants' contention: First, that the Supreme Court of the State of Washington did not so hold; and, Second, that if it did so hold, that the question as to whether the contract still exists as modified is one upon which Federal Courts will exercise their independent judgment.

VI

Summarizing the foregoing statements, the sole question presented by this appeal is: Does a valid contract exist between the plaintiff and the City of Spokane for the furnishing of telephonic services? If so, no question of confiscation is presented and the Federal Courts are without jurisdiction.

For the consideration of the foregoing points appellants think that the following portions of the record are necessary and they, therefore, designate same to be printed:

1. Amended and supplemental complaint and exhibits thereto attached.

2. Joint answer of defendants to amended and supplemental complaint with exhibits thereto attached.

3. Of the report of John F. Condon, special master in chancery, only that portion with reference to "franchise contract as to rates" on pages 277 to 283, inclusive, of the [fols. 350 & 351] typewritten clerk's record.

4. Of the defendants' exceptions to the master's report, only exceptions Nos. 15, 19 and 20, at pages 286 and 289 of the clerk's typewritten record.

5. Opinion of three judges filed April 22, 1926.

6. Decree of May 18, 1926.

7. Order of substitution.

8. Assignment of errors.

9. Petition for allowance of appeal.

10. Order allowing appeal.

11. Order fixing amount of bond on appeal.

12. Bond on appeal.

13. Citation.

14. Acceptance of service.

15. Praecipe.

John H. Dunbar, Attorney General of the State of Washington; H. C. Brodie, Assistant Attorney General of the State of Washington, Solicitors for Appellant. J. W. Geraghty, Alex. M. Winston, of Counsel.

Service of the foregoing statement of points intended to be relied upon by appellant and designation of parts of the record to be printed acknowledged this 22nd day of September, 1926.

H. H. Rigg, Post & Russell, Pilcher, Hadley & Sutton, Solicitors for Appellee.

[Endorsed: No. 355] [File endorsement omitted.]

Endorsed on cover: File No. 32,136. W. Washington [illegible] T. S. Term No. 369. John F. Dunbar, as Director of Public Works of Washington, et al., Appellants, vs. Department of Transportation of Washington, et al. Filed December 15th, 1926. File No. 32,136.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1926.

No. 769.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

v.

THE HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellee.

APPEAL FROM A DECREE GRANTING A PERMANENT INJUNCTION.

Brief and Argument of Appellants

JOHN H. DUNBAR,
Attorney General of the State of Washington.

H. C. BRODIE,
Assistant Attorney General of the State of Washington.

J. M. GERAGHTY,
ALEX M. WINSTON,
Of Counsel.

Solicitors for Appellants.

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IN THE

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OCTOBER TERM, 1926.

No. 769.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants.

v.

THE HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellee.

APPEAL FROM A DECREE GRANTING A PERMANENT INJUNCTION.

Brief and Argument of Appellants

STATEMENT OF THE CASE.

The Appellee (hereinafter referred to as the "Company") is a corporation organized under the laws of the state of Washington. It is now engaged

in operating a general telephone and telegraph business in the city of Spokane, Washington, and the territory immediately adjacent thereto. The rates it charges for telephone service are subject to regulation by the Department of Public Works of the state, formerly the Public Service Commission. The Department of Public Works will be hereinafter referred to as the "Department." In 1905 the Company commenced its operations under a franchise fixing maximum rates for residence and business service and has ever since been and now is operating under said franchise (R. 23, 98, 100, 111).

On August 8, 1919, the Public Service Commission of Washington, on application of the Company, attempted to make an order prescribing the maximum rates to be thereafter charged by the Company for its service in the Spokane exchange and these rates were thereafter charged until September 20, 1922. On this latter date, the Company filed with the Commission a schedule advancing its rates over those charged by it since August 8, 1919 (R. 3, 18). Under the state law authorizing a suspension of rate increases, pending an investigation of their reasonableness (Remington's Compiled Statutes, 1922, sec. 10424), the Department on September 24, 1922, suspended the operation of the increased rates for the full statutory period (R. 3).

On March 31, 1923, the Department entered an order denying the Company's application to increase its rates (R. 33). On April 24, 1923, the Company

filed a complaint in the United States District Court for the Western District of Washington, Southern Division, and on May 21, 1925, the Company filed its amended and supplemental complaint in which it alleged the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of the latter schedule by the Department and the making by the Department of the order of March 31, 1923 (R. 1). The said complaint and amended complaint further alleged that by the refusal of the Department to permit the rate increase sought by the company, that it, the Company, was deprived of its property against the provisions of the Constitution of the United States and sought an injunction against the Department and the Attorney General restraining them from enforcing the order of March 31, 1923 (R. 7, 10-13). To this amended and supplemental complaint the Department and the Attorney General interposed an answer alleging, among other things, the existence of the franchise before mentioned, that the said franchise was still in force and effect, save as modified by the order of the Department of August 8, 1919, and that the rates charged by the Company under said last named order were in excess of the rates provided for in the franchise (R. 96-99).

This cause was referred to a Special Master who found that the franchise granted by the City of Spokane to the Company was still in effect, save for the action of the Department as evidenced by its orders

of August 8, 1919, and March 31, 1923 (R. 116). The Master then found that by the making of these orders the provisions of the franchise contracts, so far as rates are concerned, had been terminated and annulled by said orders and were no longer in effect (R. 118). This conclusion of the Master was adopted by the three-judge statutory court (*Pacific Tel. & Tel. Co. v. Whitcomb*, 12 Fed. 2d. 279) and an injunction granted against the Department and the Attorney General on the ground that the existing rates were confiscatory was made permanent (R. 129-138). From the decree, granting the permanent injunction, filed May 19, 1926, this appeal is taken (R. 139).

ASSIGNMENTS OF ERROR.

1. The lower court erred in granting the permanent injunction.

2. The lower court erred in holding that the order of the Department of August 8, 1919, annulled the franchise contract between the Company and the City of Spokane so far as rates are concerned.

3. The lower court erred in holding that the order of the Department of March 31, 1923, annulled the franchise contract so far as rates are concerned.

4. The lower court erred in not holding that the franchise contract between the Company and the City of Spokane is now in force and effect, save as modified by the orders of the Department, of dates August 8, 1919, and March 31, 1923.

ARGUMENT.

But one question is presented by this appeal, to-wit: Is the franchise contract between the Company and the City of Spokane in existence and in force and effect, save as altered and modified by the orders of the Department, or did the orders of the Department have the effect to annul the contract so far as the rates to be charged by the Company are concerned?

This franchise has been adjudicated, as to its terms concerning rates, to constitute a valid agreement between the Company on the one hand and the city and its citizens on the other, save as it might be altered by the Department or its predecessors.

> *State ex rel. Ellertsen v. Home Telephone and Telegraph Company*, 102 Wash. 196, 172 Pac. 899.

When the franchise to the Company was granted by the city, it was in legal effect granted by the state, acting through one of its political subdivisions, and is, therefore, in effect, a contract between the state and the Company, and, as is said by this court in *Henderson Water Co. v. Corporation Commission*, 269 U. S. 278, citing *Trenton v. New Jersey*, 262 U. S. 182:

> "Only by securing the waiver of the franchise rates by order of the Corporation Commission speaking for the state, would the Water Company have any standing to ask for a fixing of rates in excess of the franchise rates."

If, therefore, the contract as modified is still in existence, there is no confiscation of plaintiff's property and this court is without jurisdiction.

Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399.

The order of the then Public Service Commission of Washington, entered on February 13, 1919, while in terms fixing new rates and directing the termination of the franchise contract, in so many words, was an order made by virtue of the statutory authority granted it. If it should be deemed, for the purpose of argument, that the Commission intended to wholly wipe out the contract and if it had no authority or jurisdiction so to do, the order is a nullity and may be collaterally attacked.

Schroeder v. Raymond, 117 Wash. 238, 204 Pac. 180.

When on February 13, 1919, the then Public Service Commission of Washington attempted to modify the exchange rates of the plaintiff, it was without jurisdiction so to do. The order was a nullity, the United States, through the Postmaster General, being in exclusive control of the operation of and the rates and charges of the Spokane exchange.

Dakota Central Tel. Co. v. So. Dak., 250 U. S. 163.

Section 10379 of Remington's Compiled Statutes of Washington is as follows:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company

from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts; *Provided, however*, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company thereto, and thereupon such contract or contracts shall be terminated by such telephone or telegraph company *as and when* directed by such order." (Italics, of course, ours.)

Other sections of the Code, numbered 10372, 10373, 10376, 10422, 10426 and 10428, show conclusively that it was the intention of the law-makers that all rates of public utilities should be under the control of the Commission or Department, as the case may be, and that a utility may only change an existing contract rate by the substitution of a rate fixed and approved by the Commission or Department, as the case may be.

In construing the quoted section, every word must be given effect and no single word having a meaning may be disregarded.

25 R. C. L. 1004;

Lawrence v. Allen, 7 Howard 785;

Bend v. Hoyt, 13 Peters 263.

Montclair Twp. v. Russell, 107 U. S. 147;

Postmaster Gen. of the U. S. v. Early, 12 Wheat. 136.

No effect can be given to the words "as and" unless the franchise contract still remains in existence, save as altered and modified by the order of the Commission or Department.

In the *Ellertsen* case, *supra*, it was said that the contract remained in existence "except as it may be relieved * * * by the operation of the Public Service Commission law." And, again, "assuming that by the act the state did give the Public Service Commission the right to modify the franchise rates."

In *State ex rel. Webster v. Superior Court King County*, 67 Wash. 37, 120 Pac. 861, it is said that the question there presented is whether the franchise rates "may be altered or annulled by the state under its reserved powers." Again, the state reserves the power to "alter, amend or annul the conditions of the franchise."

See also:

Monroe Water Co. v. Monroe, 135 Wash. 355, 237 Pac. 996, which last case quotes with approval from *State ex rel. Tacoma Ry. & Power Co. v. Public Service Commission*, 101 Wash. 601, at page 604, 172 Pac. 890 as follows:

"The first question is, whether the public service commission is authorized by the statute to relieve from the franchise provisions complained of when the income of the company is not sufficient to pay a reasonable rate upon the value of the property devoted to the public service and provide an adequate and sufficient service."

In *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379, it is said:

"Indeed the exertion of legislative power solely to that end is precluded by the contract impairment clause of the constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies and, at the same time, conditions its exercise."

See *Winfield v. Public Service Commission*, 118 N. E. 531.

The state has yielded a portion of its rights under the contract. A different rule might apply if it were attempted to impair a utility's rights.

Salem v. Salem Water, Light & Power Co., 255 Fed. 295.

The lower court based its ruling upon the franchise question upon *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3. The writer of this brief was counsel in that case for the City of Spokane, and the only question there raised by him was that in view of the existence of the franchise contract, while the Department of Public Works had power to alter the terms of the franchise contract, it should exercise that power sparingly. The opinion only decides that an order fixing any rates to be charged is just as effective as if it directed that the rates provided in the franchise should be and are hereby terminated. With that conclusion we find no fault. The question, however, which we are raising here has never been squarely presented to the Supreme Court of the State of Washington and before federal courts will follow the ruling of state courts construing stat-

utes, the state courts' decisions thereon must be direct and positive.

25 C. J., 841;

Southern Ry. Co. v. Simpson, 131 Fed. 705.

This court is not bound by the decision in the *Kaykendall* case, even though it should deem it to be direct and positive. Where questions of contract rights and federal questions are involved, they should and must decide for themselves such questions, even though the construction and validity of state statutes are involved.

In *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, it is said:

"In matters of contract, especially, the right of citizens of different states to litigate in the federal courts of the various states is a right to demand the independent judgments of those courts."

In *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, Judge Lurton says, the present Chief Justice concurring:

"So where a question involved in the construction of a state statute practically affects those remedies of creditors which are protected by the constitution, courts of the United States will exercise an independent judgment as to the meaning of such statutes and will not be bound by the decisions of state courts, and this, whether the case arises upon a writ of error under the twenty-fifth section of the judiciary act, or is a case where the jurisdiction was dependent upon citizenship alone. So we think another well grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes

upon which the contract or obligation depends by the highest court of the state whose statute is involved."

The facts in this case were: It was claimed on behalf of the appellant, the Louisville Trust Company, that appellee, the City of Cincinnati, had granted to the Cincinnati Inclined Plane Railway Company franchises over certain streets in the City of Cincinnati, which franchises were still in full force and effect. This claim was denied by the appellee and the appellee affirmatively showed that in an action brought by the city against the railway company it had been adjudged that the railway company had no valid franchise, and that the judgment of the lower court was affirmed by the Superior Court of Ohio in 52 Ohio State, 609, and that therefore the federal courts would follow the ruling of the Supreme Court of Ohio. This claim was denied by the Circuit Court of appeals, it using the language hereinbefore quoted. The *Louisville* case was cited with approval by this court in *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349.

It is plain, therefore, from the foregoing that until the state, acting through the Department, gave some relief to the Company, the Company, like any individual, was bound by its contract and had no standing in the federal courts to claim confiscation of its property. It had sought the franchise from the City, upon terms fixed by it, and received it. Having

received the benefit of the franchise while it was profitable, it was bound to take the bitter with the sweet and abide by it, save as the state, acting through the Department, might, as a matter of grace, modify its terms. The Department did, with the consent of the city's attorneys, increase the rates to be charged about 50 per cent over the franchise rates. True, as hereinbefore shown, this order was void, but the City abided by it. When the second order was made on March 31, 1923, this order but denied the Company a further increase in rates.

It is evident that this is not a question of confiscation. It is a question of difference of opinion between the Department and the City on the one hand and the Company on the other as to what are fair rates to be charged. We believe, and the record in this case discloses, we have acted under that belief, that the Company is entitled to earn a fair return upon its investment. We are thoroughly in disaccord with the holding of this and inferior federal courts that, as we look at it, utilities are to be permitted to earn an excessive return upon a value fixed in substance on the cost of reproduction and adding thereto a mythical going value. For this reason we are asking of this court what we believe to be our rights under a valid and existing contract. We are firm in the belief that no injustice will be done the Company by such a holding by this court. We are not believers of baiting or ham-stringing utilities. Utilities must prosper if they are to give good service. They must

receive reasonable returns to so prosper and earn a fair rate upon the investment. The trouble in this case is not confiscation, but ingratitude on the part of the utility.

CONCLUSION.

If the words "AS AND WHEN" in the statute do not mean what we contend they mean, we invite counsel for appellee to say what they do mean.

For the foregoing reasons the judgment of the lower court should be reversed with instructions to dismiss the action.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of the State of Washington,

H. C. BRODIE,
Assistant Attorney General of the State of Washington,
Solicitors for Appellants.

J. M. GERAGHTY,

ALEX M. WINSTON,
Of Counsel.

APPENDIX.

Section 10379 of Remington's Compiled Statutes 1922 of Washington.

Existing Contracts—Effect.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however*, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

Section 10372 of Remington's Compiled Statutes 1922 of Washington.

Tariff Schedule—Publication.

Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and

equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately established rates, tolls, rentals, contracts and charges applicable for such through service. The schedules printed as aforesaid shall plainly state the places between which telephone or telegraph service, or both, will be rendered, and shall also state seperately all charges and all privileges or facilities granted or allowed, and any rules or regulations or forms of contract which may in any wise change, affect or determine any of the aggregate of the rates, tolls, rentals or charges for the service rendered. A schedule shall be plainly printed in large type and a copy thereof shall be kept by every telephone company and telegraph company readily accessible to and for convenient inspection by the public at such places as may be designated by the commission, which schedule shall state the rates charged from such station to every other station on such company's line, or on any line controlled and

used by it within the state. All or any of such schedules kept as aforesaid shall be immediately produced by such telephone company or telegraph company upon the demand of any person. A notice printed in bold type and stating that such schedules are on file and open to inspection by any person, the places where the same are kept and that the agent will assist such person to determine from such schedules any rate, toll, rental, rule or regulation which is in force shall be kept posted by every telephone company and telegraph company in a conspicuous place in every station or office of such company.

SECTION 10373 OF REMINGTON'S COMPILED STATUTES 1922 OF WASHINGTON.

Changes In Schedules.

Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract or charge, which shall have been filed and published by any telephone or telegraph company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days as required in the case of original schedules in the preceding section, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, toll, contract or charge will go into effect, and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspec-

tion. The commission for good cause shown may allow changes in rates, charges, tolls, rentals or contracts without requiring the thirty days' notice and publication herein provided for, by an order specifying the change so to be made and the time when it shall take effect, and the manner in which the same shall be filed and published. When any change is made in any rate, toll, contract, rental or charge, the effect of which is to increase any rate, toll, rental or charge then existing, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or following the item in such schedule, which character shall be in such form as the commission may designate.

SECTION 10376 OF REMINGTON'S COMPILED STATUTES 1922 OF WASHINGTON.

Schedule Rate to Be Charged—Exceptions.

No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly ex-

tended to all persons and corporations under like circumstances for like or substantially similar service.

No telephone company or telegraph company subject to the provisions of this act shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys at law, and their families and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other telephone companies, telegraph companies, railroad companies and street railroad companies.

SECTION 10422 OF REMINGTON'S COMPILED STATUTES 1922 OF WASHINGTON.

Complaints.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of

any provision of law or of any order or rule of the commission: *Provided*, That no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: *Provided further*, That when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the

locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rules shall apply and pertain with regard to the joinder of complaints and parties as herein provided: *Provided*, All grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission.

SECTION 10426 OF REMINGTON'S COMPILED STATUTES 1922 OF WASHINGTON.

Remunerative Charges Cannot Be Changed.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint as herein provided, that any rate, toll, rental or charge which has been the subject of complaint and inquiry is sufficiently remunerative to the public service company affected thereby, it may order that such rate, toll, rental or charge shall not be changed, altered, abrogated or discontinued, nor shall there be any change in the classification which will change or alter such rate, toll, rental or charge without first obtaining the consent of the commission authorizing such change to be made.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES 1922 OF WASHINGTON.

Review.

Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the

court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimoney properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 161.

JOHN C. DENNY, as Director of Public Works of Washington, D. O. CLAUSEN, as Supervisor of Transportation of Washington, and O. RAY MAYER, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

vs.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Respondent.

APPEAL FROM A DECREE GRANTING A PERMANENT INJUNCTION.

REPLY BRIEF AND ARGUMENT OF APPELLANTS.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 151.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants,*

vs.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Respondent.*

APPEAL FROM A DECREE GRANTING A PERMANENT INJUNCTION.

REPLY BRIEF AND ARGUMENT OF APPELLANTS

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927

No. 151.

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellants*,

vs.

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STATEMENT OF THE CASE.

We have read appellants' reply brief in the companion case brought by the appellants herein against the Pacific Telephone and Telegraph Company, a cor-

poration, respondent, and desire to add but little to it.

We desire, however, to correct statement in respondent's brief in this case, on page 10, as follows: "On August 8, 1919, the Public Service Commission (now the department) made an order continuing the Postmaster General's rates in effect." Counsel for respondent are in error in this, as this order was only made as to the rates of the Pacific Company. See quotation from the findings of the Master on page six of respondent's brief.

THE ORDER OF THE DEPARTMENT OF DATE MARCH 31, 1923, DID NOT AFFECT THE VALIDITY AND EXISTENCE OF THE FRANCHISE CONTRACT.

In discussing this question we contended in our opening brief that the true meaning of section 10379 of Remington's Compiled Statutes of Washington is that when an order is made by the Department of Public Works directing the termination of a franchise contract and fixing new rates in such order, the franchise contract still remains in force, save as modified by the department's order.

At the close of our opening brief, under the head "Conclusion" we said: "If the words 'as and when' in the statute do not mean what we contend they mean, we invite counsel for respondent to say what they do mean." This courteous invitation was declined by the learned counsel for respondent. Because of such failure we think we are entitled to say

to the court that counsel for respondent concedes that the true meaning of the statute is what we say it means.

The Commission Act should be read as a whole. Section 10391 of the code, under which the order of the department of date March 31, 1923, was made, is as follows:

"Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the rental or use of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus, or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telephone extension or extension system, or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided.

"Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telephone company or telegraph company are unjust or unreasonable, or that the equipment, facilities or service of any telegraph company or telephone company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regula-

tions, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as hereinafter provided."

Under the statutes conferring power upon the department, it sits judicially and can only act within the scope of the statutes. 15 R. C. L., p. 841.

In *Schroeder v. Raymond*, 117 Wash. 238, 200 Pac. 1092 a like question was presented. One of the appellants, Coshun, brought an action against the City of Raymond and others to foreclose the lien of certificates of delinquency for general taxes. The land was in the City of Raymond and there were upon the property in question certain unpaid local improvement assessments. The City of Raymond was served with process and did not appear. A judgment was rendered in the action foreclosing the lien of the certificates of delinquency as against all of the defendants. Thereafter, the holders of bonds for the special improvements brought an action to foreclose the lien of such bonds. Defense was made on the ground that the City of Raymond, having been a party to the former proceeding, was barred by the general judgment in that case. The lower court held that under the provisions of Remington's Code, section 7892-40, which reads:

"The holder of any certificate of delinquency for general taxes shall, before commencing any action to foreclose the lien of such certificate pay in full all local assessments or installments thereof outstanding against the whole or any portion of the property included in such certificate of delinquency, or, he may elect to proceed to acquire title to such property sub-

ject to certain or all local assessments a lien thereon, in which case the complaint, decree of foreclosure, order of sale, sale, certificate of sale and deed shall so state."

The Supreme Court of the State of Washington, in affirming the judgment of the lower court, said:

"Not having paid the local assessments, appellants must be held to have elected to take title thereto. The court having the power to grant only the statutory relief, the language of the statute must be read into the decree, and such being the effect of the judgment appealed from, that judgment must be and is affirmed."

It will be noted in section 10391 of the code that if the department finds "that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the services rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided."

The department's jurisdiction in the case at bar, in substance, was, after a hearing, to find whether the rates charged were insufficient to yield reasonable revenue. If it had found that the rates were so insufficient, it was its duty to determine the new rates which were to be charged. The department did not make such a finding. On the contrary, it having found that the rates and charges were reasonable, it had no jurisdiction to make an order prescribing other rates to be thereafter charged.

The most casual reading of the section in question does not give the department any jurisdiction to make an order in reference to existing rates unless the order changes in some manner such existing rates.

It, therefore, follows that anything in the order of March 31, 1923, beyond the denying of the increase asked for by the respondent, is of no effect.

The action of the department in this matter was a negative one and not an affirmative one, as contemplated by the law, and the respondent can not gain any advantage by it. The order stands upon the same basis as that of a judgment of the court denying relief to a litigant. Surely in such a case a litigant could attain no right by an adverse judgment.

The case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3, is readily distinguishable from the case at bar, as in the *Kuykendall* case an order was made permitting an increase of rates to be charged by the utility.

THE APPELLANTS ARE ENTITLED TO A DETERMINATION BY THIS COURT OF THE QUESTION PRESENTED BY THEIR APPEAL.

It is urged on pages 23 and 24 of respondent's brief that the department of public works will not be heard to controvert the construction of a state statute and a rule of public policy announced by the court of last resort of the state of Washington. We understand the rule so laid down in *Stewart v. Kansas City*, 239 U. S. 14, and the cases cited therein

and other cases, to be that a state officer may not challenge in the United States Supreme Court the decision of his state court construing a state statute, and we have no quarrel here with that rule. We do contend, however, that the rule has no applicability in this case. The *Stewart* case and practically all the cases of similar character are cases where the state officer by writ of error is making a direct attack upon the state court's decision, and asking the Supreme Court to reverse that very decision. In the instant case the appellants have been deprived of any opportunity to present the question to the state court, because the respondent has preferred to litigate the matters in this controversy in the Federal court.

It was stated on page 14 of our opening brief that the opinion of the state court in *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, only decides that an order of the department fixing rates to be charged by a public service company, which order did not make specific reference to the franchise rate, nevertheless terminated the franchise rate just as effectively as if stated in express terms that the rates provided in the franchise are hereby terminated. It was further stated in our opening brief that the question which we are raising here has never been squarely presented to the supreme court of the state of Washington. In other words, the supreme court of Washington has decided that, when the department makes an order authorizing a rate different from the franchise rate, it thereby terminates the

franchise *rate*. Our court, however, has never been asked to determine the question which we present in this case, namely, that, when the department has terminated a franchise rate, the effect is to substitute for the terminated rate the new rate prescribed by the department, and the franchise continues as a binding contract between the company and the city, being merely altered or modified as to the rate. It is the contention of respondent that, when the department terminates a franchise rate, there is no longer any franchise rate provision, but the rate becomes a statutory rate and is thereafter governed by the general statutory provisions. It is the contention of appellants that, when the department terminates a franchise rate and prescribes a new rate, the effect of the department's order is simply to terminate one rate and substitute therefor a new rate, and that, after such substitution has been made, there still continues a franchise contract between the company and the city, which cannot be again changed except by the discretion of the department, and that the refusal of the department to exercise that discretion raises no question of confiscation. We think it clearly apparent that this question, which we now urge, has never been presented to the state court, and that we may now properly present it to this court in the first instance, the respondent, having by choice of the Federal forum, rendered it impossible to present it to the state court. Since the question involved in this litigation has never been presented to the state court, obviously the

department's appeal from the district court does not constitute an attack upon the state court's interpretation of a state statute.

We are of the opinion that the judgment of the lower court was erroneous and should be reversed with instructions to dismiss the action.

Respectfully submitted,

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Solicitors for Appellants.

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In the

Supreme Court of the United States

OCTOBER TERM, 1927

No. 151

JOHN C. DENNEY, as Director of Public Works of Washington; O. O. CALDERHEAD, as Supervisor of Transportation of Washington; and C. REA MOORE, as Supervisor of Public Utilities of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,

Appellants,

vs.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Respondent.

APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Respondent

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APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Respondent

STATEMENT OF THE CASE

The Department of Public Works of the State of Washington (the members of which and the Attorney General are the appellants, and are hereinafter re-

ferred to as the "Department") after an exhaustive investigation in which all parties in interest were fully heard, entered the order in suit on March 31, 1923, prescribing the telephone rates to be charged by The Home Telephone and Telegraph Company of Spokane, appellee (hereinafter referred to as the "Company") in the Spokane Exchange.

A few days later this suit was commenced by the Company in the District Court of the United States, for the Western District of Washington, to enjoin the enforcement of these rates as being confiscatory of the property of the Company in violation of the due process provision of the Fourteenth Amendment.

An interlocutory injunction was applied for and granted by the three-judge court constituted under Section 266 of the Judicial Code, and thereafter the cause was heard by a Special Master upon whose report the court of three judges (organized pursuant to Section 266 as amended February 13, 1925, requiring three judges on final hearing) entered its final decree adjudging the rates confiscatory and granting a permanent injunction.

The case below is *Home Tel. & Tel. Co. of Spokane v. Denney, et al.*, 12 Fed. (2d) 279. The opinion is in the Record, pp. 120-139.

The defense below presented two principal contentions, namely: first, that the rates were not confiscatory in effect, and, second, that the rates to be charged in Spokane were contractual franchise rates, and therefore were not confiscatory in the constitutional sense, although non-compensatory.

The first contention has now been abandoned, and it stands admitted that the rates were confiscatory in effect. Only the second question is, therefore, presented upon this appeal. In deciding this question in favor of the Company, the court below said:

"In behalf of the cities of Seattle, Tacoma* and Spokane, it is contended that the plaintiff companies are entitled to no relief because in these cities the companies were operating under franchises which prescribed rates substantially lower than those allowed by the department, and that the franchise rates are controlling, particularly since the department did not expressly and in pointed terms abrogate and cancel them. It cannot be doubted that where a franchise contract is entered into between a municipality and a public utility corporation fixing rates to be charged by the latter for a not grossly unreasonable period of time, such rates are binding and enforcible, even those confiscatory of the property involved. *St. Cloud Public Service Co. v. City of St. Cloud*, 44 S. Ct. 492, 265

*The reference to Seattle and Tacoma is due to the fact that the case of Pacific Tel. & Tel. Co. against the Department (which involved Seattle and Tacoma rates) and this case, were considered as consolidated for certain purposes by the Special Master and the Statutory Court.

U. S. 352, 68 L. Ed. 1050. Nor can it be doubted that under the statutes of the state of Washington the department has the power to abrogate and cancel such franchise rates if in a proper case it sees fit to do so. Section 10379 of Remington's Compiled Statutes of Washington provides:

" 'Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment, or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commisssion shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order. L. 1911, p. 567, §43.'

"Construing this statute in the case of *State ex rel. Spokane v. Kuykendall*, 205 P. 3, 4, 5, 119 Wash. 107, 111, 112, the Supreme Court of Washington said:

" 'By the act of 1911 (Laws of 1911, p. 551, § 34) the terms of a franchise contract like the one in question here are binding upon the parties until the Department of Public Works (heretofore the Public Service Commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. *State ex rel. Ellertsen v. Home Tel. &*

Tel. Co., 172 P. 899, 102 Wash. 196. In the case of *State ex rel. Webster v. Superior Court*, 120 P. 861, 67 Wash. 37, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78, it was decided that the Public Service Commission law places the entire subject of rate regulation under the control of the commission, that no contract between a city representating the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case.'

"In this same case the point was urged that the department, in fixing the new rates, did not in express terms cancel and terminate the franchise rates. Answering this contention, the court said:

" 'The present order of the Department of Public Works is just as effective as if, after fixing the rates, there had been added therein the words, "and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated," or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material.'

"This holding is the construction of a state statute by the court of last resort of the state, and consequently is binding upon this court. The special master concluded that the order of the Public Service Commission (now the Department of Public Works) entered on August 8, 1919, and after the termination

of federal control of the properties, continuing in effect the rates established by the Postmaster General so far as the Pacific Company is concerned, and the orders of the department to the same effect entered on March 31, 1923, as to both the Pacific and the Home Companies, had the effect of terminating and abrogating the franchise rates, and that the rates established by the department in their stead became 'department' or 'statutory' rates, as distinguished from 'franchise' or 'contract' rates. In this we agree with him. *State ex rel. Spokane v. Kuykendall, supra.* It may be conceded that the department was not obliged to grant any relief against the rates stipulated in the franchises, and that it could not by judicial action be compelled to do so. Yet, if it undertakes to terminate such rates pursuant to its plain statutory powers, the rates substituted instead must be fair, just, and reasonable, if the plain mandate of the statute defining its duties is to be obeyed. And, when the substituted rates are challenged, they must be considered as statutory—not franchise—rates, and their character as being confiscatory or not must be measured by the principles of law applicable to such rates."

(12 Fed. (2d) 287, 288; R. pp. 189, 190, 191.)

We might well rest the Company's case upon the foregoing opinion.

POINTS AND AUTHORITIES

When the Department by order prescribes telephone rates, the rate provisions of numerous franchises are *ipso facto* terminated and the rates so fixed by order of the Department, become department, or statutory, rates as distinguished from franchise or contract rates, and their character as being confiscatory or not must be tested by the general and familiar principles of law applicable to rate regulation. If such rates are confiscatory in their effect, they are void.

(a) The Supreme Court of the State of Washington has definitely so held.

State ex rel. Spokane v. Kuykendall, 119 Wash. 107.

See also—

State ex rel. Webster v. Superior Court, 67 Wash. 37;

Puget Sound Traction Co. v. Reynolds, 244 U. S. 574-9.

(b) This construction of the state statute by the highest court of the State is binding upon the Federal courts.

Claiborne County v. Brooks, 111 U. S. 400;

Norton v. Shelby County, 118 U. S. 425;

Williams v. Eggleston, 170 U. S. 304;

Hunter v. Pittsburgh, 207 U. S. 161;

Old Colony Trust Co. v. Omaha, 230 U. S. 100;

Pacific Livestock Co. v. Oregon Water Board, 241 U. S. 440;

Pennsylvania R. R. Co. v. Towers, 245 U. S. 6;

New York & Queens Gas Co. v. McCall, 245 U. S. 345;

Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394;

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Southern Iowa Electric Co. v. Chariton, 255 U. S. 539;

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Georgia Ry. & P. Co. v. Decatur, 262 U. S. 432;

Opelika v. Opelika Sewer Co., 265 U. S. 215;

Old Colony Trust Co. v. Tacoma, 230 Fed. 389.

The cases cited and relied upon in appellants' brief as supporting the contrary rule are not in point.

Moreover, even in a case in which the Federal courts may exercise an independent judgment, the settled rule is that any reasonable doubt will be resolved in favor of that construction of a state statute

which has been adopted by the court of last resort in the state. In this case, the state rule is sound.

Yazoo & Mississippi Valley R. R. Co. v. Adams, 181 U. S. 580;

Burgess v. Seligman, 107 U. S. 20;

Barnum v. Okolona, 148 U. S. 393;

Kuhn v. Fairmont Coal Co., 215 U. S. 349;

Sim v. Edenborn, 242 U. S. 131.

(c) The Department will not be heard to controvert the construction of a state statute and a rule of public policy announced by the court of last resort of the state.

Southern Iowa Electric Co. v. Chariton, 255 U. S. 539;

Stewart v. Kansas City, 239 U. S. 14.

ARGUMENT

The Company's franchise to operate in the City of Spokane was granted under Ordinance A-21118, passed by the City Council on August 18, 1905, after its submission to and adoption by a vote of the people of the City of Spokane (R. pp. 100-10). The ordinance named maximum telephone rates, and the rates prescribed by the Department, which are in

controversy in this case, are in excess of the ordinance rates.

On August 1, 1918, the Postmaster General, under the authority of Congress, took possession of the telephone lines of The Home Telephone and Telegraph Company of Spokane, and retained control until August 1, 1919. During the period of Federal control, telephone rates were materially increased by the Postmaster General in the City of Spokane. The Public Service Commission of Washington on March 20, 1919, during the period of Federal control, made an order establishing the rates fixed by the Postmaster General as the rates of The Home Telephone and Telegraph Company of Spokane (R. p. 116). At the expiration of the period of Federal control, Congress provided that the rates theretofore fixed by the Postmaster General should continue in effect for a period of four months unless an application was made to the State Commission, or other regulatory body, for other rates. On August 8, 1919, the Public Service Commission, now the Department made an order continuing the Postmaster General's rates in effect (R. p. 116).

The Department thereafter filed a formal complaint on January 21, 1922, challenging the rates of the Home Company, and entered upon an exhaustive

investigation to which all interested persons were made parties, including the City of Spokane (R. p. 34).

After a number of hearings, in which witnesses were heard and full opportunity given for cross-examination, the Department made the order in suit, by which the Company's property was valued and existing rates continued in effect. In its investigation leading up to the order in suit, it is clear that the Department proceeded upon the theory that the franchise rates had no force and effect, and that it was in no way hampered thereby.

WHEN THE DEPARTMENT BY ORDER PRESCRIBES TELEPHONE RATES, THE RATE PROVISIONS OF MUNICIPAL FRANCHISES ARE IPSO FACTO TERMINATED AND THE RATES SO FIXED BY ORDER OF THE DEPARTMENT BECOME DEPARTMENT OR STATUTORY RATES AS DISTINGUISHED FROM FRANCHISE OR CONTRACT RATES, AND THEIR CHARACTER AS BEING CONFISCATORY OR NOT MUST BE TESTED BY THE GENERAL AND FAMILIAR PRINCIPLES OF LAW APPLICABLE TO RATE REGULATION. IF SUCH RATES ARE CONFISCATORY IN THEIR EFFECT THEY ARE VOID.

THE SUPREME COURT OF THE STATE OF WASHINGTON HAS DEFINITELY SO HELD

In the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, it was contended by the City of

Seattle that the rate provision in the franchise granted to the Independent Telephone Company could not be abrogated or terminated by the regulatory body of the state. The Supreme Court, in answer to that contention, said:

"It having been heretofore held that the constitutional power can be exercised through a commission with power to fix rates, and that the public is not bound to pass a general law fixing maximum rates, it follows that the public utilities act is a 'general law,' and under many decisions of this court, supersedes any ordinance or charter provision of any city which may conflict therewith. The power to fix rates is a mere detail in the execution of the general law, and cannot be insisted upon as the essential letter of the law."

And again—

"Where the state is a party, and it appears that there has been no express grant or waiver of its constitutional right to fix rates so as to give an ordinance the force of a contract binding upon the state (granting that under our constitution this could be done), it cannot be held, as a matter of either law or policy, that a franchise such as the one now under consideration is a contract binding upon the State of Washington."

These principles have been reaffirmed many times by the Supreme Court of the State of Washington, but we think we need not quote from the decisions

so holding because this court itself, in the case of *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574, has clearly and succinctly stated the position of the Washington Supreme Court. In the case just mentioned it is said:

"Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege are contractual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of the police power of the State unless clearly authorized to do so by the supreme legislative power. The Constitution of Washington, Art. XII, § 18, requires the Legislature to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and prevent discrimination in rates by railroads and other common carriers, and provides that, 'A railroad and transportation commission may be established, and its powers and duties fully defined by law.' By Art. XI, § 10, any city containing a population of twenty thousand inhabitants or more is permitted to frame a charter for its own government 'consistent with and subject to the constitution and laws of this state.' This constitution was adopted in 1889, long previous to the date of the earliest of plaintiff's franchise ordinances. The Supreme Court of Washington has held that the provisions of municipal charters are subject to the legislative authority of the State; that the Public Utilities Act superseded any conflicting ordinance or charter provisions of any city; and that contractual provisions in franchises conferred by mu-

nicipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the State."

A more precise and exact announcement will be found in the case of *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, where the court, after stating the statutory provision here involved, said:

"Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the Department of Public Works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

THIS CONSTRUCTION OF THE STATE STATUTE BY THE COURT OF LAST RESORT OF THE STATE IS BINDING UPON THE FEDERAL COURTS.

In *Norton v. Shelby County*, 118 U. S. 425, 439, this court said:

"Upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some principle of the Federal Constitution, or of a Federal statute, or a rule of commercial or general law. In these cases no principle of the Federal Constitution, or of any Federal law, is invaded, and no rule of general or commercial law is disregarded. The determination made relates to the existence of an inferior tribunal of the state, and that depending upon the constitutional power of the legislature of the state to create it and supersede a pre-existing institution. Upon a subject of this nature the Federal courts will recognize as authoritative the decision of the state court. As said by Mr. Justice Bradley, speaking for the court in Claiborne County v. Brooks, 111 U. S. 400, 410: 'It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state'."

In *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6, Mr. Justice Day, speaking for this court, said:

"The Court of Appeals of Maryland stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company, not where no such rates had theretofore been established, but where a new system of commutation rates had been proposed by the railroad company and submitted to the commission. Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the commission under the statutes of Maryland to revise commutation rates where such rates had already been established by the action of the company. We must accept this definition of authority in the commission, so far as the state law is concerned, and direct our inquiry to the federal question presented."

In *Pawhuska v. Pawhuska Oil Co.*, 250 U. S. 394, the court said:

"It is not contended—nor could it well be—that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore confided to it was taken away and lodged in another agency of the state—one created by the state constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly

was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final."

In *Douglas v. Noble*, 261 U. S. 165, there came before this court for consideration the dental law of the State of Washington. Mr. Justice Brandeis, speaking for this court, said that the construction of that statute

"• • • is a question of state law. Since the case is here on appeal from a Federal court, we must consider it, *Davis v. Wallace*, 257 U. S. 478. But in passing upon such questions we follow applicable decisions of the highest court of the state."

Again, in *Georgia Railway Co. v. Decatur*, 262 U. S. 432, 437, the court said:

"The principal question, and the one to which the briefs and arguments are mainly directed, is, whether the agreement between the plaintiff and the Electric Company was within the powers of the town and is now valid and subsisting. This contract has been before the Supreme Court of Georgia in the course of the litigation on three distinct occasions: 149 Ga. 1; 152 Ga. 143, and (the instant case) 153 Ga. 329. That court, in carefully considered and well reasoned opinions, sustained the authority of the municipality and upheld the contract as valid and subsisting. Defendants contend that the authority to fix rates devolved by the state constitution upon the General As-

sembly, and, therefore, that the Town of Decatur was without power to enter into a contract on that subject. When the contract was made the General Assembly had never exercised this authority and the state Supreme Court held that there was nothing in the constitution of the state which precluded the municipality from contracting as to fares; and that, while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the state had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. See *Milwaukee Electric Ry. Co. v. Wisconsin R. R. Comm.*, 238 U. S. 174, 183. This conclusion, involving, as it does, a construction of the state constitution and laws and powers of state municipalities, is controlling upon this court, as it has decided many times."

Finally, in the case of *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, it appears that three different public utilities operating in three municipalities in the State of Iowa brought suits to enjoin the enforcement of maximum rates concededly confiscatory, but specified in the franchises granted by the municipalities to the companies. The municipalities contended that they had the power to make a binding contract as to rates. The Supreme Court of Iowa had held that in that state there could not be a valid contract fixing

ermanent rates. Nevertheless, the trial judge dis-
issed the bills of complaint filed on behalf of the
tilities. On appeal this court reversed the action of
ne court below, saying:

"The total want of power of the municipalities here
n question to contract for rates, which is thus estab-
shed, and the state public policy upon which the pro-
ibition against the existence of such authority rests,
bsolutely exclude the existence of the right to en-
orce, as the result of the obligation of a contract, the
oncededly confiscatory rates which are involved, and
herefore conclusively demonstrate the error com-
nitted below in enforcing such rates upon the theory
f the existence of contract. And, indeed, the neces-
ity for this conclusion becomes doubly manifest when
t is borne in mind that the right here asserted to con-
ract in derogation of the state law and of the rule
f public policy announced by the court of last resort
f the state is urged by municipal corporations whose
very power depends upon the state law."

See also—

Claiborne County v. Brooks, 111 U. S. 400;

Williams v. Eggleston, 170 U. S. 304;

Hunter v. Pittsburgh, 207 U. S. 161;

Old Colony Trust Co. v. Omaha, 230 U. S. 100;

Pacific Livestock Co. v. Oregon Water Board, 241 U. S. 440;

New York & Queens Gas Co. v. McCall, 245 U. S. 345;

Maguire v. Reardon, 255 U. S. 271;

Opelika v. Opelika Sewer Co., 265 U. S. 215;

Old Colony Trust Co. v. Tacoma, 230 Fed. 389.

Now, how does the Department attempt to avoid the application of the rule stated in the foregoing cases? It asserts that this case falls within an alleged exception to the rule we invoke, and the cases of *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, and *Louisville Trust Co. v. City of Cincinnati*, 76 Fed. 296, are relied upon as sustaining that contention. But both of the cases cited involve private contract rights which had accrued prior to the decisions of the state courts. Neither of these cases involved the construction of a statute whereby the governmental power to regulate, subject to which a franchise had been granted, was taken away from a municipality and vested in another agency of the state.

Neither of the cited cases is, therefore, in point.

But if we view this cause from a somewhat different angle, nevertheless the same conclusion must follow.

We readily agree that when, under the Washington law, a public utility makes an application for rates in excess of those specified in a franchise, the regula-

tory body of that State is not compelled to act on that application. But if it does act, what is its duty? Practically the whole purpose of regulation is to secure adequate service, and to approve or fix fair rates. It will not be questioned, however, that a fair rate is one which is just, reasonable and sufficient, and that a rate confiscatory in effect is neither just, reasonable nor sufficient.

But if the regulatory body does not have the power to "terminate"—put an end to—rates which are unjust, unreasonable and insufficient, even though such rates are specified in a franchise, how can the purpose of regulation be accomplished?

The construction, therefore, placed upon the statute by the Washington Supreme Court, that it was "the duty of the Commission to the Company to fix a rate which was sufficient" (119 Wash. at p. 112), and that an order establishing rates at variance with franchise rates, terminated such franchise rates, is not only a reasonable, but also a sound construction of the statute.

Now, even in a case in which the Federal courts may exercise an independent judgment, the settled rule is that any reasonable doubt will be resolved in favor of that construction of a state statute which has been adopted by the court of last resort in the state.

In *Yazoo & Mississippi Val. R'd. Co. v. Adams*, 181 U. S. 580, 582, it is said:

"The statutes of the State of Mississippi necessary to be considered for the purpose of ascertaining whether the taxes for the year 1892 accrued prior to October 24 of that year, are complex and difficult of interpretation. Assuming that we may exercise an independent judgment respecting their construction, the examination we have given them leaves us in great doubt whether the argument that the taxes had accrued prior to the consolidation is a sound one. The right asserted depends upon a comparison and construction of such statutes and the settled rule of this court is that, even in a case where we may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state. *Burgess v. Seligman*, 107 U. S. 20; *Flash v. Conn*, 109 U. S. 371, 379; *Clark v. Bever*, 139 U. S. 96; *Board of Liquidation v. Louisiana*, 179 U. S. 622."

Again, in *Sim v. Edenborn*, 242 U. S. 131, 135, this court said:

"This court has many times considered how far federal tribunals, when undertaking to enforce laws of the states, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the federal

courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' This has been often reaffirmed."

See also—

Barnum v. Okolona, 148 U. S. 393;

Kuhn v. Fairmont Coal Co., 215 U. S. 349.

THE DEPARTMENT WILL NOT BE HEARD TO CONTROVERT THE CONSTRUCTION OF A STATE STATUTE AND A RULE OF PUBLIC POLICY ANNOUNCED BY THE COURT OF LAST RESORT OF THE STATE

Section 10379 is now and always has been a part of the regulatory law of the State of Washington. It is a part of the Act by which the regulatory body of that state was created. It is solely by virtue of that Act that the Department exists. Every particle of the power and authority of the Department is derived solely from that statute.

Now, on what conceivable theory may the Department, an agency of the state, say that the court of last resort of that state has misconstrued the very statute which gives existence to the Department and from which is derived all its power and authority?

As we see it, this court has twice held that it is not open to an agent of the state to attack the construction put by the court of last resort of that state upon the statute creating such agent.

"And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

Southern Iowa Electric Co. v. Chariton, 255 U. S. 539, 546.

"Plaintiff in error is not impleaded as a taxpayer nor does he defend as such. He is sued as a county officer and defends by virtue of the exercise of his functions as a county officer. In other words, he defends by virtue of laws of which he is an instrument. Constituted by the laws of the state, he yet attempts to resist one of its laws. Whether he may do so is purely a local question."

Stewart v. Kansas City, 239 U. S. 14, 16.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 150 and 151.—October Term, 1927.

John C. Denney, as Director of Public Works of Washington, et al., etc., Appellants, 150 vs. Pacific Telephone & Telegraph Co., Appellee.	Appeals from United States District Court, Western District of Washington.
John C. Denney, as Director of Public Works of Washington, et al., etc., Appellants, 151 vs. Home Telephone & Telephone Co., Appellee.	

[February 20, 1928.]

Mr Justice McReynolds delivered the opinion of the Court.

It will be convenient to dispose of these causes by one opinion as was done in the court below. *Pacific Tel. & Tel. Co.* v. *Whitcomb, et al.*, 12 Fed. (2d) 279.

Appellees operate telephone plants in Seattle, Tacoma and Spokane, Washington, under local franchises which designated maximum permissible rates. These were granted prior to 1911, but after adoption of the present Constitution of the State.

The "Public Service Commission Law" of Washington, Ch. 117, Laws 1911 (Remington's Comp. Stat. 1922, Secs. 10349-1044[a]), authorized a public service commission and directed that telephone rates, tolls, contracts and charges "shall be fair, just, reasonable and sufficient," etc. It further provided—

> "Sec. 43. (Remington's Comp. Stat. 1922, Sec. 10379)—Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract

or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: *Provided, however*, That the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

"Sec. 55 (Remington's Comp. Stat. 1922, Sec. 10391)—Whenever the commission shall find, after a hearing had upon its own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commission shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided. . . ."

Chapter 1, Laws of 1921, vested in the Department of Public Works powers theretofore entrusted to the Commission.

Control of the telephone systems owned by appellees was assumed by the Postmaster General, August 1, 1918, and retained for one year. He fixed rates for Seattle, Tacoma and Spokane higher than the maximum rates permitted by the original franchises.

The Act of July 11, 1919 (41 Stat. Ch. 10, p. 157) repealed the Act of July 16, 1918—which authorized Federal control of telephone systems—and directed that rates established by the Postmaster General should continue for four months after the termination of Federal control (July 31, 1919) unless sooner modified or changed by public authorities.

August 8, 1919, the Public Service Commission directed appellees to observe the rates established by the Postmaster General; and they continued so to do. January, 1922, the Department of Public Works by formal complaint challenged the reasonableness of these rates. In the Autumn of 1922 appellees filed schedules of pro-

posed increased rates which were suspended. Extended hearings were had concerning the value of properties devoted to the service and the reasonableness of the rates proposed. The Department found and declared the value of the properties; also "that the existing rates are just, fair, reasonable and sufficient; that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient." And on March 31, 1923, it ordered "that the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department."

Shortly thereafter appellees began these proceedings in the United States District Court. They attacked the valuations by the Department and alleged that the rates designated by the order of March 31, 1923, were confiscatory. The matter went to a master and was heard upon his report, etc. The court approved the master's conclusions that the Department's valuations were too low and the prescribed rates were confiscatory. It accordingly adjudged the challenged order void and without effect.

The causes are here by direct appeal. The valuations approved by the court are not questioned; nor is it now claimed that the rates prescribed by the departmental order would yield adequate returns. But it is said that these rates must be regarded as contractural franchise rates and therefore they cannot be confiscatory in a constitutional sense.

Appellants maintain that under the statutes of Washington when the Department terminates a franchise rate and prescribes another the result is "simply to terminate one rate and substitute therefor a new rate, and that, after such substitution has been made, there still continues a franchise contract between the company and the city, which cannot be again changed except by the discretion of the department, and that the refusal of the department to exercise that discretion raises no question of confiscation." Here, it is asserted, the department merely refused to change existing approved rates which were higher than the maxima originally specified in the granted franchises.

The powers and duties of the Department of Public Works and the effect of its orders must be ascertained upon a consideration of

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the local constitution and statutes, and the construction placed upon them by the State courts. *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437. *Southern Iowa Electric Co.* v. *Chariton*, 255 U. S. 539.

The Public Service Law authorizes investigation of existing rates and expressly directs that whenever after a hearing they are found to be unjust or insufficient to yield reasonable compensation the Department shall determine what will be just and reasonable ones thereafter to be observed and fix the same by order. The order of March 31, 1923, in effect declared the rates then being observed just and sufficient to yield reasonable compensation. It expressly commanded their future observance and was sufficient to terminate the provisions of the franchises as to maximum rates, within the purview of Section 55, *supra*.

The Department made its investigation and order without regard to the franchise rates and treated the questions presented as unaffected thereby. It exercised the power and duty to fix reasonable and compensatory rates irrespective of any previous municipal action. We must treat the result as a bona fide effort to comply with the local statute. There is no adequate basis for the claim upon which appellants rely. *See Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574, 578.

Much consideration was given to the Public Service Law by the Supreme Court in *State ex rel. Spokane* v. *Kuykendall*, 119 Wash. 107, 111 (1920). There a gas company operating in Spokane under a franchise which prescribed maximum rates asked for increased rates. The Commission disapproved the proposed schedule but permitted the company to charge rates declared to be just, reasonable and sufficient. These exceeded the ones theretofore charged and were above the maximum permitted by franchise. The Court said:

> ". . . By the act of 1911 (Laws of 1911, p. 561, Sec. 34) the terms of a franchise contract like the one in question here are binding upon the parties until the department of public works (heretofore the public service commission) has made an order directing a departure therefrom; and, without question, the department has the right and power to order a departure. *State ex rel. Ellertsen* v. *Home Tel. & Tel. Co.*, 102 Wash. 196, 172 Pac. 899. In the case of *State ex rel. Webster*

v. *Superior Court*, 67 Wash. 37, 120 Pac. 861, it was decided that the public service commission law placed the entire subject of rate regulation under the control of the commission, that no contract between a city representing the public and a public service company would be allowed to interfere with that control, and by way of application of the rule, it was decided in that case to be the duty of the commission to the company to fix a rate which was sufficient (a rate that would afford a fair interest return on the investment), in spite of the franchise contract fixing rates which were too low. That, in legal effect, is what has been done in the present case."

Responding to an argument in behalf of the City, based upon the proviso of Section 43, *supra*, the Court further said:

"Therefrom it appears to be argued that the rates provided in the contract should continue until the commission makes an order specifically declaring and directing in so many words that the contract shall be terminated. We may overlook the fact, if need be, that, upon the petition of the city, the rates were reduced in 1913, and that in 1918 they were increased upon the application of the gas company, and consider the franchise contract as having been wholly undisturbed until the present time, and still we would be compelled to determine, as we do determine, that the present order of the department of public works is just as effective as if, after fixing the rates, there had been added therein the words 'and it is hereby directed that the rates provided in the franchise shall be and they are hereby terminated,' or words of similar import. That is the legal effect of what was done, and the form or language by which it was accomplished is not very material."

In the same cause the Gas Company maintained that the rates prescribed by the Commission's order were inadequate for its needs and unjust. This matter was carefully considered upon the merits, but the opinion nowhere suggests that the rates prescribed should be treated as if specified in the franchise and obligatory upon the Company whether compensatory or no.

Affirmed.

Mr. Justice STONE took no part in the consideration of this case.